CLERK'S COPY.

Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 270

THE PRUDENCE COMPANY, INC., PETITIONER,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND AND AMERICAN BONDING COMPANY OF BALTIMORE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 22, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

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108	Letter dated Oct. 16, 1929, of Central Park Properties to Frank Grad	1169	789
109	Contract, dated April 22, 1931, between 58-59 Realty Corp. and Otis Elevator Co. (printed in part)	1442	790

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K—Estimate submitted to Mr. Lukach, dated April 8, 1931, for painting work	960	851
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R—Schedules of Landsman, regarding costs of papering and painting (not printed)	1396	.....

United States District Court

Southern District of New York

1

THE PRUDENCE COMPANY, INC., *Plaintiff,*
against
FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

Statement Under Rule XIII.

This action was commenced in the Supreme Court, State of New York, County of New York, by the service of a summons and complaint on the 19th day of February, 1932.

The case was removed into the United States District Court, Southern District of New York, 2
and a certified copy of the record on removal was filed in the office of the Clerk of that Court on April 29, 1932.

The defendants filed their answer on the 29th day of April, 1932. A motion was made on May 17, 1932, to strike out certain affirmative defenses in the answer, and an order granting the same in part was entered on February 17, 1933.

The defendants filed an amended answer on the 2nd day of March, 1933. A motion was made on March 10, 1933, to strike out certain defenses in the amended answer, and an order granting the same in part was entered on July 28, 1933.

The defendants filed an amendment to the 3
amended answer on the 10th day of May, 1934.

There was no arrest of the defendants, no bail taken and no property attached or arrested.

The trial was held before Hon. Clarence G. Galston on the 4th, 7th, 8th, 9th, 10th, 11th and 14th days of May, 1914.

Judgment was entered on the 14th day of June, 1934.

The names of the parties are as set forth in the caption above and there has been no change of parties or attorneys since the commencement of the action.

Appeal was taken on the 10th day of September, 1934.

Summons.

SUPREME COURT,

NEW YORK COUNTY.

Trial desired in the County of New York.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

To the above named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, N. Y., February 18th, 1932.

ALFRED T. DAVISON,
Attorney for Plaintiff,
Office & P. O. Address,
2396 Third Avenue,
Borough of Manhattan,
New York, N. Y.

Complaint.

SUPREME COURT, 7

NEW YORK COUNTY.

The name of the County which the plaintiff designates as the place of trial is the County of New York.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE, 8
Defendants.

Plaintiff, for its complaint against the defendant, by ALFRED T. DAVISON, its attorney, alleges that:

FOR A FIRST CAUSE OF ACTION:

I. At all the times hereinafter mentioned, the plaintiff was and now is a domestic corporation organized and existing under the Laws of the State of New York.

9

II. At all the times hereinafter mentioned, each of the defendants was and now is a foreign corporation organized and existing under the Laws of the State of Maryland, and each of said defendants was and now is authorized to transact business in the State of New York, the defendant Fidelity and Deposit Company of Maryland having an office at No. 55 Liberty Street, in the Borough of Manhattan, City, County and State

10 of New York, and the defendant American Bonding Company of Baltimore having an office at No. 16 Court Street, in the Borough of Brooklyn, County of Kings, City and State of New York.

III. On or about the 24th day of September, 1929, the plaintiff and Central Park Properties, Inc., a New York Corporation, executed and delivered, each to the other, an agreement dated September 24th, 1929 (nerinafter referred to as "Building Loan Agreement"), wherein said Central Park Properties, Inc. was referred to as the "borrower" and this plaintiff was referred to as the "lender".

11

IV. In and by said Building Loan Agreement, this plaintiff (lender) agreed to lend and advance to the Central Park Properties, Inc. (borrower) the principal sum of Six Million, Six Hundred Fifty Thousand Dollars ($6,650,000.00), and the said Central Park Properties, Inc. (borrower) agreed to take said loan and the advances on account thereof.

V. In and by said Building Loan Agreement, it was agreed that said loan (referred to in subdivision marked "IV" hereof) should be evi-

12 denced and secured by a bond and mortgage, which said mortgage should be a valid first lien upon the premises on the South side of West 59th Street, in the Borough of Manhattan, City, County and State of New York, distant 100 feet easterly from the corner formed by the intersection of the said southerly line of West 59th Street and the easterly line of Seventh Avenue, said premises extending from the southerly side of West 59th Street to the northerly side of West 58th Street, and being 206 feet, 4 inches in width on West

59th Street and West 58th Street, and 200 feet, 10 inches deep on each side, on which said premises the said Central Park Properties, Inc. (borrower) agreed to erect, according to the plans and specifications theretofore submitted to and approved in writing by the lender (this plaintiff), (which said plans and specifications are hereinafter referred to as "plans and specifications") a modern 40 story and basement fireproof hotel, containing 1269 rooms and 687 bathrooms, together with the usual equipment installed in buildings of that type, not including hotel furniture and furnishings, and which said hotel or building is hereinafter referred to as "building". 13 14

VI. In and by said Building Loan Agreement, Central Park Properties, Inc. (borrower) agreed to cause the said building to be completed and ready for occupancy not later than December 16, 1930.

VII. In and by said Building Loan Agreement Central Park Properties, Inc. (borrower) agreed as follows:

> "The Borrower shall furnish to the Lender a surety bond in the amount of $3,000,000., in a company satisfactory to Lender, to be in form and contents satisfactory to Lender, conditioned upon and guaranteeing completion of said building within the time hereinafter specified in strict accordance with said plans and specifications and this agreement and free from claims or liens." 15

VIII. In and by said Building Loan Agreement, it was agreed by and between this plaintiff (lender) and said Central Park Properties, Inc.

16 (borrower) that the said loan was to be advanced in such amounts and at such times as the lender (this plaintiff) should approve, and that advances might be made by this plaintiff (lender) as and when it believed it advisable so to do, and that all such advances or payments should be deemed to have been made in pursuance of said Building Loan Agreement, and that the making of any advance or any part of an advance should not be deemed an approval or acceptance by the lender (this plaintiff) of the work theretofore done.

IX. Thereafter and on or about the 25th day
17 of September, 1929, the defendants, for a valuable consideration, made, executed and delivered to the plaintiff their joint and several surety bond in the amount of Three Million Dollars ($3,000,000.), conditioned upon and guaranteeing completion of the building described in the Building Loan Agreement not later than the 16th day of December, 1930, in strict accordance with the said Building Loan Agreement and the said plans and specifications and free from liens or claims, and which said bond or undertaking is hereinafter sometimes referred to as the "Surety Bond".

18 X. Said Surety Bond was the Surety Bond referred to in that part of said Building Loan Agreement which is hereinabove quoted in subdivision marked "VII" hereof.

XI. Said Surety Bond was executed and delivered by the Central Park Properties, Inc. (thereinafter sometimes called the "Principal"), as Principal, and by the defendants (thereinafter sometimes called the "Surety") as sureties.

XII. In and by said Surety Bond above mentioned, the said Central Park Properties, Inc. as

Principal, and the said defendants, as Sureties, bound themselves, jointly and severally unto the plaintiff (thereinafter sometimes called the "Obligee"), as Obligee, in the principal sum of Three Million Dollars ($3,000,000) lawful money of the United States of America for the payment whereof to the said Obligee (this plaintiff), its successors and assigns, the said Principal (Central Park Properties, Inc.) and the said Sureties (the defendants herein), thereby bound themselves and their respective successors and assigns, jointly and severally, firmly by said Surety Bond. 19

XIII. Said Surety Bond recited that the Principal (Central Park Properties, Inc.) and the said Obligee (this plaintiff), had entered into the Building Loan Agreement dated the 24th day of September, 1929, hereinabove mentioned, and duly filed in the office of the Clerk of the County of New York on the 29th day of September, 1929, and said Surety Bond contained the further recital or provision as follows: 20

> "and said building loan agreement" (being the Building Loan Agreement mentioned and described in subdivision marked "III" hereof) "and all and singular the terms thereof are hereby made a part of this bond by reference thereto with the same force and effect as if set forth in full in the body hereof, being hereinafter referred to as the 'building loan agreement';" 21

XIV. Said Surety Bond contained the further recitals as follows (the word "Principal" as herein used meaning Central Park Properties, Inc., and the word "Surety" meaning the defendants herein, and the word "Obligee" meaning this plaintiff):

22 "WHEREAS the principal, among other things, has agreed to erect, construct and complete on the said described premises" (being the premises described in Subdivision marked "V" hereof) "a modern forty (40) story and basement fireproof hotel containing twelve hundred and sixty-nine (1269) rooms and six hundred eighty-seven (687) bathrooms, together with electrical refrigeration and the usual equipment installed in buildings of this type, excepting hotel furniture and furnishings; and

23 WHEREAS, the said building is to be erected, constructed and completed in accordance with the plans and specifications prepared by Frank Grad, Architect, of No. 521 Fifth Avenue, New York City, heretofore delivered by the Principal to the Obligee, and amendments thereto made by the Obligee in a memorandum dated September 24, 1929, and said plans and specifications and the amendments thereto" (being the same Plans and Specifications referred to in Subdivision marked "V" hereof) "are hereby referred to and incorporated in and made a part hereof with the same force
24 and effect as if set forth in full in the body hereof, being hereinafter together referred to as the 'plans and specifications'; and

WHEREAS, the Principal has agreed to deliver to the Obligee a surety bond in the amount of $3,000,000 in a company satisfactory to the Obligee, to be in form and contents satisfactory to the Obligee, conditioned upon and guaranteeing completion of the said described building not later than the 16th day

of December, 1930, in strict accordance with the said building loan agreement and the said plans and specifications and free from liens or claims, and the Obligee has consented to accept this bond; and

WHEREAS, the Principal and Surety are thoroughly familiar with all of the terms, provisions, conditions and requirements contained in said building loan agreement and with the said plans and specifications and all of the details thereof, and are duly authorized and empowered to make, execute and deliver this bond by their respective boards of directors;"

XV. After making the foregoing recitals the condition of such Surety Bond so executed and delivered by the defendants, as Sureties, to this plaintiff as hereinabove set forth, was stated to be and was and is as follows (the words "Principal", "Surety" and "Obligee" as herein used having the same meaning as above set forth):

"NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH:

That if the said Principal shall from the date hereof continuously proceed with reasonable speed and in a workmanlike manner with the construction and completion of said building in accordance with the terms, provisions and conditions of said building loan agreement and the said plans and specifications, so that the said building shall be well and truly constructed and completed in strict accordance with said building loan agreement and with said plans and specifications and

fully completed and ready for occupancy as a modern hotel not later than the 16th day of December, 1930, together with all equipment customary in a building of the type provided for in said building loan agreement, installed not later than the said 16th day of December, 1930, in all respects fully complying with the building Code of the City of New York, and with all laws, rules, ordinances, regulations and requirements of the County of New York, City of New York, and State of New York, and any governmental bureau, department, officer or agent applicable to the erection and construction of said building or to the use and occupancy thereof, and the Board of Fire Underwriters having jurisdiction thereof, and free and clear of and from any and all mechanics' or materialmen's liens or other liens, claims of architects, conditional sale contracts, chattel mortgages and charges for work and labor performed or for materials, machinery, fixtures, refrigerating units, appliances or equipment used or installed in or about the said building, and any municipal violations against said premises and the improvements thereon: AND IF said Principal shall pay the entire cost of the erection, construction and completion of said building, and for all equipment to be installed therein in accordance with said building loan agreement and plans and specifications; AND IF the said Surety shall fully indemnify and save harmless said Obligee, its successors and assigns, from and against any and all loss or damage by reason of failure of the Principal to con-

struct, fully pay for and complete said building and install, supply and fully pay for such equipment within the time aforesaid and as provided for in said building loan agreement and plans and specifications; AND IF said Surety shall make good any and every default on the part of the Principal in constructing, paying for and completing said building and supplying, installing and paying for equipment as aforesaid, and shall make good any and every other default by the Principal in performing any of the other terms, covenants or conditions in said building loan agreement set forth by the Principal to be kept and performed up to and including the completion of and payment for said building and installation of and payment for said equipment in accordance with said building loan agreement and plans and specifications, free and clear as aforesaid, within the time aforesaid and in the manner that the Principal is obligated to keep and perform the same, and shall fully indemnify and save harmless the Obligee, its successors and assigns, from and against any and all loss or damage by reason of any and all claims, costs, suits, judgments, counsel fees and damages which may be incurred or suffered by the Obligee in making good any default on the part of the Principal and/or Surety, and shall fully comply with the terms, covenants and conditions hereinbefore and hereinafter set forth on the part of the Principal and/or Surety to be performed; THEN this obligation to be and become void, otherwise to remain in full force and effect."

34 XVI. The said surety bond so executed and delivered by the defendants, as Sureties, to this plaintiff, as hereinabove set forth, further provided:

> "No changes from said plans and specifications above referred to, including any changes in the design or cubic contents of or the materials or equipment in said building or in the performance of the work of construction of said building, and no delay, neglect or failure of the Obligee to proceed promptly or otherwise to enforce the completion of said build-
35 ing by the Principal or enforce any remedy it may have against the principal, and no act done or omission of or action or proceeding taken by the Obligee in case of any default by the Principal, shall in any respect release or relieve the Principal or Surety from their obligations hereunder (which shall also include all such changes)."

XVII. Thereafter and prior to the 16th day of December, 1930, this plaintiff, being satisfied that it was advisable to make such advances, advanced to the principal, Central Park Properties, Inc.,
36 at various times and in various amounts, the sum of Six Million Six Hundred Fifty Thousand Dollars ($6,650,000.), of which the sum of Seventy-five Thousand Dollars ($75,000) was deposited by said principal with the plaintiff and which said sum of $75,000. was thereafter applied by the plaintiff on account of the said principal of $6,650,000., leaving a balance due and owing of Six Million Five Hundred Seventy-five Thousand Dollars ($6,575,000.), with interest thereon.

XVIII. Such advances hereinabove set forth in subdivision marked "XVII" hereof, by this plaintiff to said Central Park Properties, Inc. were made in such amounts and at such times as this plaintiff (lender) approved, and were made in pursuance of said Building Loan Agreement. 37

XIX. Before the final advance was made by this plaintiff to said Central Park Properties, Inc., as set forth in subdivision marked "XVII" hereof, Central Park Properties, Inc. (borrower) obtained and delivered to this plaintiff (lender) the usual Certificate of Completion, issued by the Building Department of the Borough of Manhattan, City and State of New York. 38

XX. Plaintiff has duly performed all the conditions of such surety bond on its part.

XXI. Said building was not fully completed and ready for occupancy as a modern hotel on the 16th day of December, 1930, together with all equipment customary in a building of the type provided for in said Building Loan Agreement.

XXII. On or about the 23rd day of December, 1930, said Central Park Properties, Inc. abandoned the completion of said building and left said building in an unfinished state. 39

XXIII. The said Principal (Central Park Properties, Inc.) did not construct and complete said building in accordance with the terms, provisions and conditions of said Building Loan Agreement and the said plans and specifications, and failed to comply with said Building Loan Agreement and with the said plans and specifications in that it was necessary to furnish and sup-

40 ply the labor and materials mentioned and set forth in subdivision marked "XXXV" hereof and in Schedule A hereto annexed in order to complete said building to the extent of making the same ready for occupancy and in that omissions of labor and materials called for by said Building Loan Agreement and said plans and specifications and substitutions of inferior materials were made in the construction of said building to the extent set forth in subdivision marked "XXXVI" hereof and in Schedule B hereto annexed, and said building was not well and truly constructed and completed in strict accordance with said Building
41 Loan Agreement and with said plans and specifications.

XXIV. The said Principal (Central Park Properties, Inc.) did not pay the said cost of the erection, construction and completion of said building and for all equipment to be installed therein, in accordance with said Building Loan Agreement and said plans and specifications; for particulars in connection with these defaults, this plaintiff refers to Schedule A and Schedule B hereto annexed, and as hereinafter set forth.

42 XXV. The said Surety (the defendants herein) have not indemnified and saved harmless the said Obligee (this plaintiff) from and against any of its loss and damage by reason of the failure of the Principal (Central Park Properties, Inc.), to construct, fully pay for and complete said building and install, supply and fully pay for such equipment on or before the 16th day of December, 1930, and as provided for in said Building Loan Agreement and said plans and specifications, and

said defendants have not paid to this plaintiff any of its loss and damage so suffered and sustained. 43

XXVI. Said Surety has not made good the defaults on the part of the Principal (Central Park Properties, Inc.) hereinabove set forth, or any of them.

XXVII. The said Surety (the defendants herein) have not indemnified and saved harmless the Obligee (this plaintiff) from and against its loss and damage by reason of any and all costs, counsel fees and damages which have been incurred and suffered by this plaintiff in making good the defaults on the part of the Principal and Surety. 44

XXVIII. Plaintiff notified the defendants of defaults by the Principal and Surety in the performance of the obligations contained and set forth in said Surety Bond.

XXIX. Defendants and each of them had notice from plaintiff of the fact that said building, referred to in said Surety Bond and said Building Loan Agreement, was not completed in accordance with the said Building Loan Agreement and said plans and specifications.

XXX. On the 14th day of February, 1931, and on the 25th day of February, 1931, plaintiff delivered or caused to be delivered to defendants letters, notifying them of the defaults of Central Park Properties, Inc., above set forth, which said letters were received by defendants. 45

XXXI. Plaintiff has demanded on numerous other occasions that defendants carry out and perform the covenants and obligations contained in said Surety Bond and defendants and each of

46 them, have failed and refused to carry out and perform the same.

XXXII. Defendants did not proceed or procure others to proceed with the construction and completion of said building and the supplying and installation of equipment therein.

XXXIII. After the defendants had failed for a period of more than twenty days following the receipt of the letters referred to in subdivision marked "XXX" hereof to proceed with or procure others to proceed with the construction and completion of said building and the supplying and
47 installation of equipment therein, plaintiff employed a contractor, sub-contractors, architects, superintendent, foremen, mechanics and labor and purchased materials, plant, machinery, fixtures and equipment necessary to construct and complete said building in general accordance with said building loan agreement and plans and specifications, and constructed and completed said building in general accordance with said building loan agreement and plans and specifications to the extent of making the same ready for occupancy.

48 XXXIV. The first date on which the said building was constructed and completed to the extent of making the same ready for occupancy was the first day of October, 1931.

XXXV. Plaintiff has expended for labor and materials in completing said building to the extent of making the same ready for occupancy, the sum of One Hundred Sixty Six Thousand Fifty Four and 29/100 Dollars ($166,054.29), a detailed statement of which is more particularly set forth

in Schedule A hereto attached and hereby made a part hereof. Said work, labor and services rendered and said materials furnished, as hereinabove mentioned, are set forth and numbered in Schedule "A" hereto annexed, and the amounts set forth in said Schedule "A" are the reasonable value of each item. 49

XXXVI. By reason of the omissions of numerous items and the substitutions of inferior materials in the construction of said building, which such omissions and substitutions were contrary to the said plans and specifications and to said Building Loan Agreement, the value of the said building has been materially lessened, and this plaintiff has been damaged in the further sum of Two Hundred Twenty-eight Thousand, Seven Hundred Twenty-two and 78/100 dollars ($228,722.78), as more particularly set forth in Schedule B hereto annexed and hereby made a part of this complaint. 50

XXXVII. By reason of the defaults of said Central Park Properties, Inc. and the defendants hereinabove set forth, this plaintiff has been damaged in the sum of Seven hundred eighty-eight thousand, six hundred seventy-six and 94/100 dollars ($788,676.94), with interest thereon as hereinafter set forth, in that 51

1. This plaintiff has expended for completing said building to the extent of making the same ready for occupancy, the sum of $166,054.29 with interest thereon from May 1, 1931;

2. Omissions of labor and materials called for by said Building

52 Loan Agreement and said Plans and Specifications and substitutions of inferior materials were made, as more particularly set forth in subdivision marked "XXXVI" hereof to this plaintiff's damage in the sum of $228,722.78
with interest thereon from December 16, 1930;

3. This plaintiff has been deprived of any interest and any return on the sum of Six Million Five Hundred Seventy-Five Thou-
53 sand Dollars ($6,575,000) (being the net amount of principal so loaned by this plaintiff on said building, as hereinabove set forth) from the 5th day of December, 1930 to October 1st; 1931, amounting to the sum of $325,462.50
with interest thereon from October 1, 1931;

4. This plaintiff has expended for fees of supervision in the completion of said building the sum of $ 10,000.00
with interest on $10,000 from May 1, 1931;

54

5. This plaintiff has expended for taxes covering the property on which said building is erected, for the first half of the year, 1931, the sum of $ 38,080.00
with interest thereon from June 1, 1931:

6. This plaintiff has expended for taxes covering the property on which said building is erected, for

the months of July, August and September, 1931, the sum of $ 19,040.00 with interest thereon from December 1, 1931; 55

7. This plaintiff has expended for insurance on the said building the sum of $ 1,317.37 with interest thereon from May 1, 1931.

FOR A SECOND CAUSE OF ACTION:

XXXVIII. This plaintiff repeats and realleges and incorporates as a whole in this cause of action as though the same were here set forth in full, all 56 the allegations hereinabove contained and set forth in subdivisions marked "1" to "XXXV", inclusive, of this complaint.

XXXIX. Heretofore and on or about the 18th day of December, 1930 this plaintiff caused the mortgage referred to in subdivision marked "V" hereof to be foreclosed in an action in the Supreme Court of the State of New York, New York County, entitled, "James T. Harrigan, Plaintiff, against Central Park Properties, Inc., Barclay-Arrow Holding Corporation, Concord Estates, Inc., Abraham E. Lefcourt, Frederick Brown, 57 Manufacturers Trust Company, as Trustee under indenture dated as of April 1st, 1930, The People of the State of New York, Defendants", in which such action such proceedings were had that

1. a judgment of foreclosure and sale was made and entered therein on the 19th day of January, 1931;

2. a sale at public auction was had of the mortgaged premises (being the premises de-

58 scribed in subdivision marked "V" hereof) on the 17th day of March, 1931;

3. at such sale the said mortgaged premises were sold to a nominee of this plaintiff for Six million dollars ($6,000,000);

4. a deficiency judgment was entered, filed and docketed in the New York County Clerk's office in the Sum of Seven hundred sixteen thousand, two hundred fifteen and 2/100 dollars ($716,215.02) on the 30th day of April, 1931 in favor of said James T. Harrigan and against said Central Park Properties, Inc.

59 and in and about said foreclosure proceedings and the entry of said deficiency judgment, said James T. Harrigan represented and was a nominee of, this plaintiff.

XL. If the said building had been completed on or before December 16th, 1930 in accordance with said plans and specifications and said building loan agreement, the value of the mortgaged premises (being the premises described in subdivision marked "V" hereof) would have been so much in excess of Six million, six hundred fifty thousand dollars ($6,650,000) that this plaintiff
60 upon the foreclosure of its mortgage would have realized the full amount of principal and interest due to it on account of said bond and mortgage, over and above the expenses in connection with such foreclosure.

XLI. By reason of the defaults of said Central Park Properties, Inc. and the defendants, hereinabove set forth, and the matters and things hereinabove alleged, this plaintiff has been damaged in the sum of Nine hundred fifty thousand, seven hundred six and 68/100 dollars ($950,-

706.68) with interest thereon as hereinafter set forth, in that 61

1. this plaintiff has expended for completing said building to the extent of making the same ready for occupancy, the sum of $166,054.29 with interest thereon from May 1, 1931;

2. the value of plaintiff's mortgage was impaired to the extent of at least the amount of said deficiency judgment hereinabove set forth, to wit, $716,215.02 with interest thereon from the 17th day of April, 1931; 62

3. this plaintiff has expended for fees of supervision in the completion of said building the sum of $ 10,000.00 with interest on $10,000 from May 1, 1931;

4. this plaintiff has expended for taxes covering the property on which said building is erected, for the first half of the year 1931, the sum of $ 38,080.00 with interest thereon from June 1, 1931; 63

5. this plaintiff has expended for taxes covering the property on which said building is erected, for the months of July, August and September, 1931, the sum of $ 19,040.00 with interest thereon from December 1, 1931;

6. this plaintiff has expended for insurance on the said building the sum of $ 1,317.37 with interest thereon from May 1, 1931.

64 WHEREFORE, plaintiff demands judgment against the defendants and each of them for the sum of Nine hundred fifty thousand, seven hundred six and 68/100 dollars ($950,706.68) together with interest thereon as specified in subdivisions marked "XXXVII" and "XLI" hereof, and also the costs and disbursements of this action.

ALFRED T. DAVIDSON,
Attorney for Plaintiff,
Office & P. O. Address,
2396 Third Avenue,
Borough of Manhattan,
New York City, N. Y.

65 STATE OF NEW YORK, }
COUNTY OF KINGS, } SS.:

FRANK FOX, being duly sworn, deposes and says: I am an officer, to wit, a Vice President of the plaintiff, THE PRUDENCE COMPANY, INC., in the above entitled action. The said plaintiff is a domestic corporation. The foregoing complaint is true to my knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

FRANK FOX.

66 Subscribed and Sworn to before me, }
this 18th day of February, 1932. }

CLARA E. ENGLAND,
CLARA E. ENGLAND,
Notary Public,
Kings County.
Kings Co. Clerk's No. 39, Reg. No. 2043.
Queens Co. Clerk's No. 343, Reg. No. 2331.
N. Y. Co. Clerk's No. 203, Reg. No. 2E144.
Ctf. Filed in Nassau County.
Commission expires March 30, 1932.

67

SCHEDULE A.*
(Original form.)

AMOUNTS PAID BY PLAINTIFF FOR LABOR AND MATERIALS FURNISHED IN COMPLETING THE BUILDING TO THE EXTENT OF MAKING THE SAME READY FOR OCCUPANCY.

1. BLUE PRINTS			$ 258.19
2. CARPENTRY			
(a) Carpenter—labor		$985.70	
(b) Trim bills		$152.13	
			$ 1,137.83
3. CEMENT WORK			
(a) Patching—Labor		$ 27.38	
(b) Materials (estimated)		$ 11.25	
(c) Leveling cement floors		$608.00	
			$ 646.63
4. ELECTRIC			
(a) Missing parts			
Crannell, Nugent and Kranzer, Inc.			
$ 7.75	$12.48	$ 6.88	
11.56	1.20	27.00	
2.52	8.20	13.75	
31.50	28.80	2.80	
2.10	33.58	28.10	
11.14	6.21	21.57	
6.35	23.20	.78	
8.74	78.00	.78	
11.04	9.66	.85	
2.40	34.80	1.69	
8.13	.78	3.95	
			$ 448.29
Rialto Electrical Company			8.40
(b) Fountain—reflectors—			
Heinrich Reflector Co.		$40.50	
Labor		$ 3.50	
			44.00

68

69

* Schedule A was amended at the trial and a revised Schedule A marked as Plaintiff's Exhibit 84 (offered as an exhibit for identification at page 128 and marked in evidence at page 180) was substituted for the original Schedule A printed above. A motion to conform the pleadings to the proof in respect of Schedule A was made and granted at the conclusion of the trial. (*Infra*, page 491.)

Original Schedule A

70 (c) Fire alarm system

Framing cards—		
N. Y. Picture Frame Co.	19.80	
"	1.80	
Printing Fire cards—		
Parkway Printing Co.	6.00	
Recoding—		
Crannell, Nugent & Kranzer, Inc.	8.00	
		$ 35.60

5. ELEVATORS

Finishing original contract—Otis Elevator Co.	$ 14,500.00
Removing equipment to waterproof elevator pits—Otis Elevator Company	$ 380.00

71 6. FIREPROOF WINDOWS

Missing stools and trim—Chapman Metal Products Co. Inc.	$ 1,551.60
Repairing casement windows—S. H. Pomeroy Co. Inc.	$ 125.00

7. FIREPROOF DOORS AND BUCKS

(a) Material for repairing doors—	
Reliance Bronze & Steel Corp.	$ 22.50
Roselait Building Corp.	$ 25.60

9. FLOORS

Refinishing of ballroom floor

72 Builders Wood Flooring Company

3005 sq. ft. at .07¢ $ 210.00

10. GLASS

(a) Replacing mirrors and glass—E. Ossias

$108.02	$149.35	$270.00	
12.00	357.46	167.08	
66.00	26.40	113.50	
54.80	118.79		
			$ 1,443.40

(b) Schwartz & Glasser—glass for bronze screen—1st floor $ 75.00

Original Schedule A

11. HARDWARE

(a) Making master key system, supplying missing keys and repairing locks

O'Byrne & Russell	$ 2.50		73
" " "	118.90		
" " "	65.00		
" " "	6.50		
(b) 240 door stops—O'Byrne & Russell	48.00		
		$ 240.90	
(c) Missing hardware—Rosenthal Hardware Company	$390.00		
Rosenthal Hardware Company	118.70		
		$ 508.70	74
(d) Amount paid to Rosenthal Hardware Company for unattached hardware left in building when taken over		$ 406.01	
(e) Coat and hat hooks—Lockwood Manufacturing Co.		$ 150.00	

12. IRON (ORNAMENTAL)

(a) Access Doors—

Ray, Daisley & Co.		$ 24.00	
Karp Metal Products Co.	$11.25		
" " " "	41.25		
" " " "	9.15		
		$ 61.65	75
(b) Miscellaneous iron work			
Gottlieb Iron Works	$30.00		
" " "	50.00		
" " "	125.00		
" " "	70.68		
		$ 275.68	
Aetna Iron Works		$ 275.00	

Original Schedule A

76 13. LIGHTING FIXTURES

(a) Fixtures purchased from Shapiro & Aronson, Inc. to make up for missing fixtures

	$175.25	
	123.00	
	132.00	
	158.75	
	9.00	
		$ 598.00

(b) Fixtures purchased from Lightolier Company to make up for missing fixtures

77	$93.00	
	12.00	
	17.00	
	6.00	
	68.40	
	2.40	
	42.00	
	39.90	
	28.50	
	12.00	
		$ 321.20

15. MASONRY

78 Patching up brick work on west wall of adjoining building, Hotel Meurice to prevent it from falling and to improve its unsightly appearance
Robert H. Schwartz $ 750.00

16. MISCELLANEOUS

Cleaning—
Windows—Apartment House & Window Cleaning Co. $ 925.00

Original Schedule A

Rubbish removal—			79
William Cox	$35.00		
	56.00		
	84.00		
	77.00		
	189.00		
	119.00		
	266.00		
	142.50		
		$ 968.50	
James E. Graham	$175.00		
	105.00		
		$ 280.00	
17. DAMPROOFING & WATERPROOFING			
(a) Window caulking—Hydro-Bar Corporation		$ 875.00	80
(b) Elevator pits—S. E. Stott & Co. Inc.		$ 225.00	
18. ELECTRIC CURRENT			
United Electric Light & Power Co.			
4/4 to 5/5/1931	$ 31.64		
5/5 to 6/4/1931	834.56		
6/4 to 7/6/1931	1202.32		
7/6 to 8/4/1931	1137.12		
8/4 to 9/2/1931	1872.34		
9/2 to 10/2/1931	2842.44		
		$ 7,920.72	
19. INCINERATOR			81
Tools—Stanton-Murray Corp.		$ 25.00	
20. KITCHEN EQUIPMENT		$ 295.00	
24. TELEPHONE			
May, June, July, August and September 1931—		$ 5,667.59	
27. PAINTING			
Landsman Bros. & Soffin		$ 71,650.00	

Original Schedule A

82 29. REFRIGERATION

(a) Gas mask and cabinet—A. T. Miller Supply Co. $ 21.78

(b) Repairing compressor—Yoss Inc. Machine Works $ 424.71

(c) Missing parts for Electrolux boxes in serving pantries—Consolidated Gas Co. of New York $ 30.14

30. PLASTERING

(a) Patching—labor $ 436.80

(b) Estimated amount of material for above $ 55.00

31. PLUMBING

83 (a) Shower curtains—687 at $2.00 each— $ 1,374.00

Note:—The contract wtih the Acme Curtain Company was for $2.40 each for Rayon Taffeta Curtains, but the plumbing specifications called for white duck, a fair price for which is $2. each.

Shower curtain pins:— $ 428.68

(b) Missing parts—Moylan Supply Co. Inc.

$ 6.00	$ 3.96
4.47	3.96
22.80	24.60
84 3.15	42.00
21.00	31.80
	$ 163.74

(c) Repairing tubs—Burnside Plumbers Specialties Co. $ 28.00

(d) Murray & Sorenson, Inc. (Missing exterior bronze plates) $ 30.00

32. ROOFING AND SHEET METAL

(a) Repairing roof on 32nd floor terrace due to improper workmanship—Primo Roofing Co. $ 54.26

Original Schedule A

33. STEAMFITTING

Insulating ceilings of steam and incinerator rooms—Asbestor Construction Company $ 700.00 85

34. STEAM CONSUMPTION (N. Y. STEAM CORP.)

3/31—4/30/1931	$381.31
4/30—5/29/1931	161.46
5/29—6/30/1931	102.50
6/30—7/31/1931	102.60
7/31—8/31/1931	327.61
8/31—9/30/1931	610.63
	$ 1,686.11

37. KITCHEN CABINETS

Missing hardware—The White Door Bed Company

$ 5.74	86
47.27	
$ 53.01	

38. BRONZE

(a) Contract—Suburban Bronze & Iron Corp., for bronze screen between entrance lobby and dining room and between entrance foyer and lounge, all as shown on original plans $ 1,350.00

(b) Two radiator grilles missing in 59th Street vestibule $ 20.00

(c) Repairing bronze doors to ballroom $ 44.35

39. TERRAZZO

Polishing 1st floor terrazzo— $ 675.28 87

41. PAY ROLLS TO OCTOBER 1, 1931 $ 45,123.44

TOTAL $166,054.29

SCHEDULE B.*

(Original form.)

88

LABOR AND MATERIALS OMITTED AND NOT SUPPLIED BY PLAINTIFF; AND SUBSTITUTIONS BY CENTRAL PARK PROPERTIES, INC. OF MATERIALS INFERIOR TO THOSE CALLED FOR BY PLANS AND SPECIFICATIONS.

2. CARPENTRY

(a) Kellestone Carpet strips — $ 8,450.00

(b) Wood stools and aprons were omitted from 2335 metal windows in rooms from 2nd to 40th floors inclusive, which were specified on page 11, paragraph 39 of the Carpentry and millwork specifications

89

2335 fireproofed wood stools and aprons at $4.00 each—erected	$9,340.00	
2335 metal stools and aprons erected at $1.80 each	$4,203.00	
Difference		$ 5,137.00

(c) Cement base with wood cap moulding was substituted for the 6" one piece wood base specified on page #10, paragraph 33 of the carpentry and millwork specifications and on the schedule of interior finish for 574 foyers, 440 living rooms, 681 bedrooms, and 473 serving pantries from the 2nd to the 40th floors inclusive.

90

6" cement base with wood moulding per ft.	.18¢
6" one member fireproofed wood base, " "	.35¢
Difference	.17¢

Estimated lineal feet 78,388 at .17¢ — $ 13,325.00

4. ELECTRIC

(a) Charts in each panel box — $ 300.00

(b) Unfinished work in barber shop — $ 250.00

* Schedule B was amended at the trial and a revised Schedule B marked as Plaintiff's Exhibit 85 (offered as an exhibit for identification at page 128 and marked in evidence at page 180), was substituted for the original Schedule B printed above. A motion to conform the pleadings to the proof in respect of Schedule B was made and granted at the conclusion of the trial. (*Infra*, page 491.)

Original Schedule B

7. FIREPROOF DOORS AND BUCKS

(a) Copper kalamein roof doors specified, instead of iron kalamein doors now in place—5 at $40.00 — $ 200.00

8. FIREPROOF ARCHES

Fireproofing omitted on floor beams in 21st floor plenum chamber — $ 200.00

10. GLASS

(a) 681 bedroom mirrors—plain instead of beveled as specified; cost of removing, beveling edges, resilvering and resetting at $6.75 each— — $ 4,596.75

(b) Glazed upper panel roof doors. Specified but not furnished—
estimated amount for glass — $ 100.00

(c) Glazed doors on first floor—specified but not furnished.
estimated amount for glass — $ 60.00

11. HARDWARE

Difference between value of hardware actually installed and amount specifications called for as hardware expense — $ 29,500.00

12. IRON (ORNAMENTAL)

Vault door specified for book vault 1st floor—not furnished — $ 150.00

Iron ladder missing to water meter—to be installed —valve — $ 15.00

13. LIGHTING FIXTURES

(a) Difference between value of lighting fixtures actually installed and amount specifications called for as lighting fixture expense — $ 26,900.00

(b) Fixtures missing from 1st floor—estimated cost — $ 850.00

14. MARBLE

Terrazzo installed on lobby floor instead of marble as called for on plans—difference — $ 3,889.50

Original Schedule B

94 15. MASONRY

Brick costing $33.00 per thousand was used instead of the $38.00 per thousand brick specified on page 3, paragraph 5 of the masonry specification.
1,300,000 Continental Fiske brick used at $33.00 per thousand.
Difference in cost $ 6,500.00

16. MISCELLANEOUS

(a) Mantle pieces—an allowance of $150.00 was made on page 9 of the Preliminary and Miscellaneous work specification for each fireplace mantle for each living room from the 18th to the 38th floors inclusive—144 in all, and $250.00 each for the four mantles on the 39th floor. All of these fireplace mantles were omitted. $ 22,600.00

95

21. MAIL CHUTE

Installed, but not paid for; now in use under rental arrangement.
Cost of installation $ 4,000.00

22. MEDICINE CABINETS

Difference between value of medicine cabinets actually installed and amount called for in specifications as medicine cabinet expense $ 4,069.44

25. WIRE GUARDS

96

For machinery in basement—required by statute—not yet purchased—estimated amount $ 300.00

26. CORK FLOORS

Cork floor shown on 40th floor public elevator lobby 364 sq. ft. at .70¢— $ 254.80

27. PAINTING

Difference between amount actually spent and amount which would have been required to comply with plans and specifications $ 19,150.00

Original Schedule B

28. PLANT

97

(a) Ventilation—two additional sections for air filter and charging and cleaning tanks—specified but not purchased— $ 100.00

29. REFRIGERATION

Difference between value of apartment refrigerators actually installed and amount called for in specifications as refrigerator expense $ 7,953.00

30. PLASTERING, FURRING AND LATHING

(a) No plastering done in barber shop—estimated amount— $ 750.00

98

(b) Paragraph 20 on page 10 of the plastering specification and schedule sheet #14 calls for wainscot of Keene's Cement 4'6" high in all service elevator vestibules and lobbies throughout the building. No Keene's cement wainscots were put in any of these spaces
1222 yards at $4.77 (removing existing plaster and applying Keene's cement) $ 5,828.94

31. PLUMBING

The following items are called for in the specification but were never furnished or installed:—

99

Perforated hush pipes in house tank discharge line	$ 50.00
Gas shut-off valve	150.00
Pressure gauges on water meter	50.00
1—6" check valve omitted on water meter	125.00
Gauges on discharge of house pumps	100.00
Liquid soap dispenser system	300.00
Two Siamese connections	60.00
Five lavatories omitted in barber shop	625.00
Valve charts	300.00
	$ 1,760.00

Original Schedule B

100 32. ROOFING AND SHEET METAL

Amount required by the Fordham Cornice works, original roofing contractor, to furnish the guarantee called for in the specification.	$ 500.00
Copper louvres and screens were omitted from the main stack on the main bulkhead roof	$ 280.00

33. STEAMFITTING

(a) Radiators omitted in all stores	$ 700.00
(b) Valve charts and brass tags omitted	$ 375.00
(c) One years supply of gauge charts	$ 25.00
(d) Radiators omitted in interior bathrooms—estimate of Chas. H. Darmstadt, Inc.—	$ 25,000.00
101 Cost of cutting and patching plaster and tile work to install above	$ 17,000.00
(e) Rubbish chute, called for in specification,—omitted	$ 4,500.00

35. TERRA COTTA

Caps missing from end piers on north and south terraces, 1st bulkhead	$ 275.00

36. TILE

(a) Barber shop—floor and wall tile omitted	$ 2,022.00
(b) Soap dishes installed over wash basins in guest	
102 baths instead of combination soap, glass and toothbrush holders	$ 1,030.00
(c) Fixtures omitted over lavatories in servants rooms	$ 191.75

38. BRONZE WORK

Bronze screens omitted from lobby floor	$ 1,650.00
Glass for above	$ 525.00

Original Schedule B

39. TERRAZZO

1395 sq. ft. of terrazzo on 1st floor not polished at .08¢ per sq. ft. $ 111.60

40. CABINET WORK

(a) Racks and shelving omitted in check room, 1st floor $ 150.00

(b) Room clerks office—mail and key racks and shelving omitted $ 1,200.00

(c) File racks and 4 wood screens on counters of desk space in main lobby omitted $ 550.00

(d) Telephone room—counter and phone booths omitted $ 1,350.00

(e) Private dining rooms 1st floor—wood folding doors omitted $ 1,158.00

(f) Teak and burl wall paneling was omitted from behind the desk space, cashiers space and news and ticket stand $ 2,940.00

Total $228,722.78

Original Answer, Verified April 29, 1932.*

106 UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

The defendants, by their attorney, Thomas E. White, answering the complaint herein:

107 FIRST: Admit that on or about the 24th day of September, 1929, the plaintiff and Central Park Properties, Inc., entered into a certain building loan agreement, and that said building loan agreement contained numerous terms, conditions and provisions, for the exact wording and purport of which the defendants refer to the original thereof when produced by the plaintiff upon the trial of this action but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs V, VI, VII and VIII of the complaint.

108 SECOND: Admit that on or about the 25th day of September, 1929, Central Park Properties, Inc., as principal and the defendants as sureties executed and delivered to the plaintiff their surety bond in the amount of $3,000,000, for the exact terms, conditions and provisions of which the defendants beg leave to refer to the original thereof

* By order of the District Court (Hon. WILLIAM BONDY, *D.J.*) dated February 17, 1933 (*Infra*, page 536), a motion to strike out certain defenses in the original answer was granted, with leave to the defendant to serve an amended answer. The original answer above was thereafter superseded by an amended answer verified March 2, 1933 (*Infra*, page 47).

when produced by the plaintiff upon the trial of 109
this action but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs IX, XII, XIII, XIV, XV and XVI of the complaint.

THIRD: Deny any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph X of the complaint.

FOURTH: Admit that prior to the 16th day of December, 1930, the plaintiff advanced to Central Park Properties, Inc., at various times and in various amounts the sum of $6,650,000 of which 110
the sum of $75,000 was deposited by Central Park Properties, Inc., for plaintiff and was thereafter appropriated by plaintiff for payment on account of said $6,650,000 but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XVII and XVIII of the complaint.

FIFTH: Deny any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph XIX of the complaint.

SIXTH: Upon information and belief, deny each 111
and every allegation contained in paragraphs XX, XXI, XXII, XXIII and XXIV of the complaint.

SEVENTH: Admit that the defendants have not paid to the plaintiff any monies under and by virtue of the said surety bond but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XXV, XXVI and XXVII of the complaint.

EIGHTH: Admit that the plaintiff notified the defendants of certain alleged defaults in the per-

112 formance of the obligations contained in the bond and of certain alleged defaults of Central Park Properties, Inc., and that the said building was alleged to be not completed in accordance with the building loan agreement and the plans and specifications but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XXVIII, XXIX and XXX of the complaint.

NINTH: Admit that plaintiff has demanded that the defendants remedy certain claimed defaults of Central Park Properties, Inc., and that defen-
113 dants have not remedied said alleged defaults but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XXXI and XXXII of the complaint.

TENTH: Upon information and belief, deny each and every allegation contained in paragraphs XXXIII, XXXIV, XXXV, XXXVI and XXXVII of the complaint.

ELEVENTH: Deny any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph
114 XXXIX of the complaint.

TWELFTH: Upon information and belief, deny each and every allegation contained in paragraphs XL and XLI of the complaint.

FOR A FIRST SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTEENTH: That the building loan agreement entered into between the plaintiff and Central Park Properties, Inc., provided that the building

to be erected by Central Park Properties, Inc., should be completed and ready for occupancy not later than December 16, 1930. 115

FOURTEENTH: That on the 5th day of December, 1930, the building was in such condition that it would have required a sum in excess of $170,000 to complete the same and make it ready for occupancy, and there were omissions of labor and materials from and substitutions of inferior materials in said building amounting in value to a sum in excess of $230,000.

FIFTEENTH: That on the said 5th day of December, 1930, the plaintiff had knowledge of the facts alleged in paragraph Fourteenth of this answer. 116

SIXTEENTH: That on the said 5th day of December, 1930, the plaintiff had advanced to Central Park Properties, Inc., all of the monies which it agreed to advance under said building loan agreement except the sum of $300,000.

SEVENTEENTH: That on the said 5th day of December, 1930, the plaintiff made a final payment of the said sum of $300,000 to Central Park Properties, Inc.

EIGHTEENTH: That the payment by said plaintiff of the said sum of $300,000 was a breach of the duty owing by the plaintiff to the defendants and by reason thereof the liability of the defendants under their bond was released and discharged. 117

FOR A SECOND SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

NINETEENTH: That the terms and provisions of the building loan agreement entered into between

118 the plaintiff and Central Park Properties, Inc., were made a part of the bond of the defendants by reference.

TWENTIETH: That said building loan agreement provided that the plaintiff would make a first advance of the sum of $3,250,000 at the time of closing, and that as to the remaining $3,250,000 all subsequent advances except the final one would be made by the plaintiff on the basis of 75% of the value of the labor and materials installed and incorporated in the construction of the building, and that the other 25% would be paid to Central
119 Park Properties, Inc., as a final advance.

TWENTY-FIRST: That the said building loan agreement further provided that no advance would be due and payable unless all work usually done at the stage of construction when the advance was applied for had been done in a good and workmanlike manner and all materials and fixtures usually furnished and installed at such stage of construction had been furnished and installed.

TWENTY-SECOND: That on the 5th day of December, 1930, the plaintiff had in its possession as and for the final advance only the sum of $300,000
120 instead of the sum of $812,500, and that on said date the plaintiff made the final advance of $300,000 to Central Park Properties, Inc., although, to the knowledge of plaintiff, all work usually done at that stage had not been done in a good and workmanlike manner and all the materials and fixtures usually furnished and installed at such stage had not been furnished and installed.

TWENTY-THIRD: That by reason thereof, the liability of the defendants under their bond was released and discharged.

FOR A THIRD SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF: 121

TWENTY-FOURTH: That the building loan agreement entered into between the plaintiff and Central Park Properties, Inc., provided that the building to be erected by Central Park Properties, Inc., should be completed and ready for occupancy not later than December 16, 1930.

TWENTY-FIFTH: That on December 5, 1930, the plaintiff owed to the defendants the duty of reserving sufficient of the monies then in its possession to assure the completion of said building. 122

TWENTY-SIXTH: That on the 5th day of December, 1930, the sum of $300,000 would have been sufficient money with which to complete said building and make it ready for occupancy.

TWENTY-SEVENTH: That on the 5th day of December, 1930, the plaintiff had the sum of $300,000 in its possession and it delivered the same to Central Park Properties, Inc.

TWENTY-EIGHTH: That by reason thereof, the liability of the defendants under their bond was thereby released and discharged. 123

FOR A FOURTH SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

TWENTY-NINTH: That the bond executed and delivered by the defendants to the plaintiff expressly provided that the plaintiff would deliver to the defendants written notice of any default by Central Park Properties, Inc., within thirty

124 days after two executive officers of plaintiff should have actual notice thereof.

THIRTIETH: That on or about the 16th day of December, 1930, two executive officers of plaintiff had actual notice of the default of Central Park Properties, Inc., in not completing said building and making it ready for occupancy, and that the plaintiff failed to give to the defendants written notice of such default as provided by the bond.

THIRTY-FIRST: That by reason thereof, the liability of the defendants under said bond was released and discharged.

125

FOR A FIFTH SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTY-SECOND: That the bond executed by defendants and delivered to the plaintiff provided that the plaintiff would retain from the total amount agreed to be advanced by the plaintiff to Central Park Properties, Inc., sufficient money with which the building might be completed in the event of the default of Central Park Properties, Inc., and the plaintiff agreed that in the event of
126 any such default it would place at the disposal of the defendants such unadvanced amounts of money as would have been receivable by Central Park Properties, Inc., if the latter had not committed any default.

THIRTY-THIRD: That on the 16th day of December, 1930, Central Park Properties, Inc., had defaulted in the performance of its agreement with the plaintiff in that the building was not then completed and ready for occupancy.

THIRTY-FOURTH: That on the said 16th day of December, 1930, there were no monies in the hands of the plaintiff which were applicable to the completion of said building. 127

THIRTY-FIFTH: That by reason of the premises the liability of the defendants under their bond was released and discharged.

FOR A SIXTH SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTY-SIXTH: That on the 5th day of December, 1930, the plaintiff and Central Park Properties, Inc., agreed that all the work required for the completion of the building provided for in the building loan agreement had been done except work which could be completed for the sum of $75,000. 128

THIRTY-SEVENTH: That on the said 5th day of December, 1930, and at the time the said agreement was made the plaintiff made to Central Park Properties, Inc., a final advance of $300,000, and the Central Park Properties, Inc., deposited with the plaintiff the sum of $75,000, being the maximum amount required for the completion of the building. 129

THIRTY-EIGHTH: That by reason thereof, the liability of the defendants on their bond was released and discharged.

FOR A SEVENTH SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTY-NINTH: That the building loan agreement entered into between the plaintiff and Cen-

130 tral Park Properties, Inc., provided that the final advance would not be due and payable until Central Park Properties, Inc., had obtained and delivered to the plaintiff a certificate of completion issued by the Building Department of the City of New York.

FORTIETH: That on the 5th day of December, 1930, the plaintiff made to Central Park Properties, Inc., the final advance under said building loan agreement in the sum of $300,000.

FORTY-FIRST: That at the time of said payment no certificate of completion had been obtained
131 from the Building Department of the City of New York and delivered to the plaintiff.

FORTY-SECOND: That by reason thereof, the liability of the defendants under their bond was released and discharged.

FOR AN EIGHTH SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

FORTY-THIRD: That the building loan agreement entered into between the plaintiff and Central Park Properties, Inc., provided that all ad-
132 vances by plaintiff to Central Park Properties, Inc., would be made after application by Central Park Properties, Inc., which application should set forth the work incorporated to the date of the application, together with the cost of each item.

FORTY-FOURTH: That the plaintiff failed to comply with said provision and made advances without obtaining information as to the work incorporated and its cost.

FORTY-FIFTH: That by reason thereof, the liability of the defendants under their bond was released and discharged. 133.

FOR A NINTH SEPARATE, DISTINCT AND PARTIAL DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

FORTY-SIXTH: ~~Reiterates~~ and realleges paragraphs Thirty-sixth and Thirty-seventh of this answer.

FORTY-SEVENTH: That the said $75,000 should have been applied by the plaintiff to the completion of the said building, but instead thereof the plaintiff applied said sum on account of the principal or interest which became due on a mortgage of the Central Park Properties, Inc., to the plaintiff. 134

FOR A TENTH SEPARATE, DISTINCT AND PARTIAL DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

FORTY-EIGHTH: That the omissions of items and the substitutions of inferior materials as alleged in paragraph XXXVI of the complaint were made with the knowledge and approval of the plaintiff. 135

FORTY-NINTH: That by reason thereof, as to such omissions and substitutions, the plaintiff waived strict performance of the terms and provisions of the building loan agreement and of the plans and specifications, and the plaintiff is estopped to allege that the said omissions and the said substitutions were contrary to the said plans and specifications and to said building loan agreement.

136 WHEREFORE, the defendants demand judgment dismissing the complaint with costs.

THOMAS E. WHITE,
Attorney for Defendants,
55 Liberty Street,
New York, N. Y.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

THOMAS P. CUMMINGS, being duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof, and that
137 the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the reason this verification is made by deponent and not by the defendants herein, is because the said defendants are corporations and deponent is an officer of one of the defendants, Fidelity and Deposit Company of Maryland, to wit, its Assistant Secretary.

THOMAS P. CUMMINGS.

Sworn to before me, this }
138 29th day of April, 1932. }

ANN S. BRANVALL,
Notary Public,
Queens County No. 2574,
Cert. filed in N. Y. Co.

* Amended Answer, Verified March 2, 1933.

UNITED STATES DISTRICT COURT, 139
SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

The defendants, by their attorney, Thomas E. White, answering the complaint herein by their amended answer allege: 140

FIRST: Admit that on or about the 24th day of September, 1929, the plaintiff and Central Park Properties, Inc., entered into a certain building loan agreement, and that said building loan agreement contained numerous terms, conditions and provisions, for the exact wording and purport of which the defendants refer to the original thereof when produced by the plaintiff upon the trial of this action but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraph VIII of the complaint. 141

SECOND: Admit that on or about the 25th day of September, 1929, Central Park Properties, Inc., as principal and the defendants as sureties executed and delivered to the plaintiff their surety bond in the amount of $3,000,000, for the exact terms, conditions and provisions of which the

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*(Original amended answer bears the following notation by Clerk):

Note:—See Order filed 7/29/33, granting motion to strike out 2nd, 3rd, 5th and 6th defenses in amended answer, denying motion to strike out 1st defense in amended answer, and withdrawing motion to strike out 4th defense in amended answer (Order signed by Bondy, J.).

142 defendants beg leave to refer to the original thereof when produced by the plaintiff upon the trial of this action, but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraph IX of the complaint.

THIRD: Admit that prior to the 16th day of December, 1930, the plaintiff advanced to Central Park Properties, Inc., at various times and in various amounts the sum of $6,650,000 of which the sum of $75,000 was deposited by Central Park Properties, Inc., with plaintiff and was thereafter
143 appropriated by plaintiff for payment on account of said $6,650,000 but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XVII and XVIII of the complaint.

FOURTH: Upon information and belief, deny each and every allegation contained in paragraphs XIX, XX, XXI, XXII, XXIII and XXIV of the complaint.

FIFTH: Admit that the defendants have not paid to the plaintiff any monies under and by virtue of the said surety bond but, except as here-
144 in specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XXV, XXVI and XXVII of the complaint.

SIXTH: Admit that the plaintiff notified the defendants of certain alleged defaults in the performance of the obligations contained in the bond and of certain alleged defaults of Central Park Properties, Inc., and that the said building was alleged to be not completed in accordance with the

building loan agreement and the plans and specifications but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XXVIII, XXIX and XXX of the complaint. 145

SEVENTH: Admit that plaintiff has demanded that the defendants remedy certain claimed defaults of Central Park Properties, Inc., and that defendants have not remedied said alleged defaults but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XXXI and XXXII of the complaint.

146

EIGHTH: Upon information and belief, deny each and every allegation contained in paragraphs XXXIII, XXXIV, XXXV, XXXVI and XXXVII of the complaint.

NINTH: Deny any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph XXXIX of the complaint.

TENTH: Upon information and belief, deny each and every allegation contained in paragraphs XL and XLI of the complaint.

147

FOR A FIRST SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

ELEVENTH: That the building loan agreement entered into between the plaintiff and Central Park Properties, Inc., provided that the building to be erected by Central Park Properties, Inc., should be completed and ready for occupancy not later than December 16, 1930.

148 TWELFTH: That on the 5th day of December, 1930, the building was in such condition that it would have required a sum in excess of $170,000 to complete the same and make it ready for occupancy, and there were omissions of labor and materials from and substitution of inferior materials in said building amounting in value to a sum in excess of $230,000.

THIRTEENTH: That on the said 5th day of December, 1930, the plaintiff had knowledge of the facts alleged in paragraph Twelfth of this answer.

FOURTEENTH: That on the said 5th day of
149 December, 1930, the plaintiff had advanced to Central Park Properties, Inc., all of the monies which it agreed to advance under said building loan agreement except the sum of $300,000.

FIFTEENTH: That on the said 5th day of December, 1930, the plaintiff made said final payment of $300,000 although it was advised and knew that Central Park Properties, Inc. would be unable to complete the building in accordance with the terms of the contract and that it would necessarily have to default.

150 SIXTEENTH: That the payment by said plaintiff of the said sum of $300,000 was made in bad faith and in absolute disregard of the rights of the defendants, and by reason thereof the liability of the defendants under their bond was released and discharged.

FOR A SECOND SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

SEVENTEENTH: That the terms and provisions of the building loan agreement entered into be-

tween the plaintiff and Central Park Properties, Inc., were made a part of the bond of the defendants by reference. 151

EIGHTEENTH: That said building loan agreement provided that the plaintiff would make a first advance of the sum of $3,250,000 at the time of closing, and that as to the remaining $3,250,000 all subsequent advances except the final one would be made by the plaintiff on the basis of 75% of the value of the labor and materials installed and incorporated in the construction of the building, and that the other 25% would be paid to Central Park Properties, Inc., as a final advance. 152

NINETEENTH: That the said building loan agreement further provided that no advance would be due and payable unless all work usually done at the stage of construction when the advance was applied for had been done in a good and workmanlike manner and all materials and fixtures usually furnished and installed at such stage of construction had been furnished and installed.

TWENTIETH: That on the 5th day of December, 1930, the value of labor and materials still remaining to be installed and incorporated in the construction of the building was in excess of the sum of $400,000. 153

TWENTY-FIRST: That on the said 5th day of December, 1930, the value of the labor and materials at that time installed and incorporated in the construction of the building was approximately $2,850,000 and 75% of said $2,850,000 is $2,137,500.

TWENTY-SECOND: That if the plaintiff had complied with the terms of the building loan agree-

154 ment, it would have had in its possession a sum in excess of $1,000,000 applicable to the completion of the said building, the payment of all interests, taxes, insurance, fees of supervision and other expenses and sufficient in addition thereto to satisfy any deficiency judgment arising out of the foreclosure of the mortgage.

TWENTY-THIRD: That on the said 5th day of December, 1930, the plaintiff made a final advance of the sum of $300,000.

TWENTY-FOURTH: That by reason of the failure of the plaintiff to comply with the terms of the
155 said building loan agreement, upon the default of Central Park Properties, Inc., there was no money in the possession of the plaintiff with which to complete the said building and the defendants have been damaged to the sum of $404,777.07, the cost of completion.

TWENTY-FIFTH: That by reason of the premises the defendants were prejudiced in that if the plaintiff had complied with the provisions of the building loan agreement and had not been negligent, there would have been in the hands of the plaintiff sufficient to satisfy all of the claims for
156 which this suit is instituted.

TWENTY-SIXTH: That by reason thereof, the liability of the defendants under their bond was released and discharged.

FOR A THIRD SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

TWENTY-SEVENTH: That the building loan agreement entered into between the plaintiff and Cen-

tral Park Properties, Inc., provided that the building to be erected by Central Park Properties, Inc., should be completed and ready for occupancy not later than December 16, 1930. 157

TWENTY-EIGHTH: That on December 5, 1930, the plaintiff owed to the defendants the duty of reserving sufficient of the monies then in its possession to assure the completion of said building.

TWENTY-NINTH: That on the 5th day of December, 1930, the sum of $300,000 would have been sufficient money with which to complete said building and make it ready for occupancy, and that on said day the plaintiff had the sum of $300,000 in 158 its possession.

THIRTIETH: That on the said 5th day of December, 1930, the plaintiff paid to Central Park Properties, Inc., the said sum of $300,000 being the last of the money in the possession of the plaintiff available for Central Park Properties, Inc., under the terms of the building loan agreement.

THIRTY-FIRST: That plaintiff made said payment of $300,000 although it well knew that the building would not be completed in accordance with the terms of the contract, that Central Park Properties, Inc., was then in a bad financial condition 159 and would default on its contract.

THIRTY-SECOND: That by reason thereof, the liability of the defendants under their bond was thereby released and discharged.

FOR A FOURTH SEPARATE, DISTINCT AND PARTIAL DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTY-THIRD: That the bond executed and delivered by the defendants to the plaintiff expressly

160 provided that the plaintiff would deliver to the defendants written notice of any default by Central Park Properties, Inc., within thirty days after two executive officers of plaintiff should have actual notice thereof.

THIRTY-FOURTH: That on or about the 16th day of December, 1930, two executive officers of plaintiff had actual notice of the default of Central Park Properties, Inc., in not completing said building and making it ready for occupancy, and that the plaintiff failed to give to the defendants written notice of such default as provided by the
161 bond.

THIRTY-FIFTH: That by reason thereof the defendants were damaged in an amount which they are unable at this time to state definitely but which they believe to be in the sum of approximately $400,000.

FOR A FIFTH SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTY-SIXTH: That on the 5th day of December, 1930, the plaintiff and Central Park Properties, Inc., agreed that all the work required for
162 the completion of the building provided for in the building loan agreement had been done except work which could be completed for the sum of $75,000.

THIRTY-SEVENTH: That on the said 5th day of December, 1930, and at the time the said agreement was made the plaintiff made to Central Park Properties, Inc., a final advance of $300,000, and the Central Park Properties, Inc., deposited with

the plaintiff the sum of $75,000, being the maximum amount required for the completion of the building. 163

THIRTY-EIGHTH: That by reason thereof, the liability of the defendants on their bond was released and discharged.

FOR A SIXTH SEPARATE, DISTINCT AND PARTIAL DEFENSE TO THE FIRST CAUSE OF ACTION SET UP IN THE COMPLAINT DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTY-NINTH: Reiterates and realleges paragraphs Thirty-sixth and Thirty-seventh of this amended answer. 164

FORTIETH: That the said $75,000 should have been applied by the plaintiff to the completion of the said building, but instead thereof the plaintiff applied said sum on account of the principal or interest which became due on a mortgage of the Central Park Properties, Inc., to the plaintiff.

FOR A SEVENTH SEPARATE, DISTINCT AND PARTIAL DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

FORTY-FIRST: That the omissions of items and the substitutions of inferior materials as alleged in paragraph XXXVI of the complaint were made with the knowledge and approval of the plaintiff. 165

FORTY-SECOND: That by reason thereof, as to such omissions and substitutions, the plaintiff waived strict performance of the terms and provisions of the building loan agreement and of the plans and specifications, and the plaintiff is estopped to allege that the said omissions and the said

166 substitutions were contrary to the said plans and specifications and to said building loan agreement.

WHEREFORE, the defendants demand judgment dismissing the complaint with costs.

THOMAS E. WHITE,
Attorney for Defendants,
55 Liberty Street,
New York, N. Y.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

167 ANDREW G. SCHNEIDER, being duly sworn, deposes and says that he has read the foregoing amended answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the reason this verification is made by deponent and not by the defendants herein, is because the said defendants are corporations and deponent is an officer of one of the defendants, Fidelity and Deposit Company of Maryland, to wit, its Assistant Secretary.

168 ANDREW G. SCHNEIDER.
Asst. Secy. T. E. W.

Sworn to before me, this }
2nd day of March, 1933. }

ANNA S. BRANVALL,
Notary Public.

Amendment to Amended Answer, Verified May 10, 1934.

169

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,

Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,

Defendants.

170

The defendants, by their attorney, Thomas E. White, for a first separate, distinct and complete defense to the complaint herein allege, upon information and belief:

ELEVENTH: That the building loan agreement entered into between the plaintiff and Central Park Properties, Inc., provided that the building to be erected by Central Park Properties, Inc., should be completed and ready for occupancy not later than December 16, 1930.

TWELFTH: That prior to the 5th day of December, 1930, the plaintiff had advanced to Central Park Properties, Inc., all of the monies which it had agreed to advance under the terms of said building loan agreement except the sum of $300,000, and that on the said 5th day of December, 1930, the plaintiff made a final payment of $300,000 to Central Park Properties, Inc. 171

THIRTEENTH: That on the said 5th day of December, 1930, and prior to the making of said payment of $300,000 the plaintiff had as great knowl-

172 edge as it now has knowledge of the condition of the building which the Central Park Properties, Inc., had agreed to erect as regards the details in which said building was still incomplete and as regards any claimed omissions of labor and materials from and substitution of inferior materials in said building.

FOURTEENTH: That on the said 5th day of December, 1930, and prior thereto the plaintiff knew that Central Park Properties, Inc., had been in default in its obligations to the contractors who had furnished labor and materials in the erection
173 of said building and that the said Central Park Properties, Inc., would be unable to complete the building in strict accordance with the terms of the building loan agreement.

FIFTEENTH: That knowing the details of incompletion and omissions and substitutions in said building the payment by said plaintiff of the said sum of $300,000 with the intention thereafter of claiming against these defendants was made in bad faith and in absolute disregard of the rights of the defendants and that by reason thereof the liability of the defendants under their bond was
174 released and discharged.

THOMAS E. WHITE,
Attorney for Defendants,
99 John Street,
New York, N. Y.

Amendment to Amended Answer

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.: 175

ANDREW G. SCHNEIDER, being duly sworn, deposes and says that he has read the foregoing amended answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the reason this verification is made by deponent and not by the defendants herein, is because the said defendants are corporations and deponent is an officer of one of the defendants, Fidelity and Deposit 176
Company of Maryland, to wit, its Assistant Secretary.

ANDREW G. SCHNEIDER,
Asst. Secy.

Sworn to before me, this }
10th day of May, 1934. }

ANN S. PRANVALL,
Notary Public, Queens Co. No. 2733, Reg. No. 6604.
Cert, filed N. Y. Co. No. 943, Reg. No. 5B573.
Cert. filed Kings Co. No. 97, Reg. No. 5424. 177
Cert. filed Bronx Co. No. 56, Reg. No. 190B35.
Cert. filed Nassau Co. Clerk's Office.
Cert. filed Richmond Co. Clerk's Office.
Cert. filed West Co. Clerk's Office Reg. Office.
Commission expires March 30, 1935.

Extract from Clerk's Minutes.

178

At a stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court Room, in the United States Court House and Post Office Building in the Borough of Manhattan, City of New York, on the 4th day of May in the year of Our Lord One thousand nine hundred and thirty-four.

Present: Hon. CLARENCE G. GALSTON,
District Judge.

179

[L-52-110—Calendar #837]

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

Now comes the plaintiff, by Alfred T. Davison, by Martin A. Schenck, Orrin G. Judd and Ralph
180 C. Williams, Jr., of Counsel, and moves the trial of this Court. Likewise comes the defendants, by Mr. Thomas E. White by Mr. Joseph F. Murray, of Counsel.

Thereupon a jury of one is duly empaneled and sworn, and the cause proceeds to trial. It is stipulated by counsel for both parties that this cause be tried by a jury of one. Trial began and continued, 7th, 8th, 9th, 10th, 11th, 14th and 15th. Counsel for defendants moves to amend the answer. Denied. Same motion renewed. Granted on condition.

Extract from Clerk's Minutes.

Same counsel moves to amend first defense in 181
answer. Granted.

Counsel for plaintiff moves to dismiss amended defense. Denied, exception.

Counsel for defendants moves to dismiss complaint. Denied, exception.

Counsel for defendants moves to dismiss complaint. Again denied, exception.

Counsel for plaintiff moves to direct a verdict. Denied, exception.

The court then having heard all the witnesses, examined the exhibits and heard each counsel in final argument. The case is submitted. Briefs by the 22nd inst. 182

An extract of the minutes.

CHARLES WEISER,
Clerk.

Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[L 52—110]

THE PRUDENCE COMPANY, INC., 183
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

The issues in the above entitled action having been duly brought on for trial and tried before Hon. Clarence G. Galston and a jury of one, at a

Judgment

184 Stated Term of this Court, held in and for the Southern District of New York, at the Post Office Building, in the City of New York, in said District, on the 7th, 8th, 9th, 10th, 11th, 14th and 15th days of May, 1934, and a verdict having been duly directed on the 6th day of June, 1934, in favor of The Prudence Company, Inc., plaintiff, against the defendants Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore, in the amount of Seven hundred ninety-eight thousand four hundred sixteen and 81/100 dollars ($798,416.81), with interest from May 15, 1934, and the parties thereupon and on the 7th
185 day of June, 1934, having stipulated, and the Court thereon having ordered, that the verdict be reduced from said sum of Seven hundred ninety-eight thousand four hundred sixteen and 81/100 dollars ($798,416.81) to the sum of Seven hundred seventy-seven thousand nine hundred thirty-four and 54/100 dollars ($777,934.54), with interest from May 15, 1934,

Now, on motion of Alfred T. Davison, attorney for plaintiff,

It is Adjudged that this plaintiff recover of said
186 defendants the sum of Seven hundred seventy-seven thousand nine hundred thirty-four and 54/100 dollars ($777,934.54), with interest thereon from May 15, 1934, to the date hereof in the sum of $3,760.02, amounting in all to the sum of $781,694.56, and that the plaintiff have execution against the defendants therefor.

Judgment signed this 14th day of June, 1934.

CHARLES WEISER,
Clerk.

Stipulation for Reduction of Verdict.

UNITED STATES DISTRICT COURT, 187
SOUTHERN DISTRICT OF NEW YORK.
[L-52-110]

THE PRUDENCE COMPANY, INC.,
Plaintiff,
against
FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

It is hereby stipulated that the amount of the verdict herein may be reduced from $798,416.81 188
to the sum of $777,934.54 by the elimination of the item of $17,000, together with interest thereon in the amount of $3,482.17, said item being on Plaintiff's Exhibit 85, Item 33-(e), "Cost of cutting and patching plaster and tile work to install same $17,000", such elimination being consequent upon the elimination of the item referred to in the Court's opinion on Plaintiff's Exhibit 85, Item 33-(d), "Radiators omitted in 568 interior bathrooms $25,000".

It is further stipulated that this reduction of the verdict is without prejudice to either side in 189
any other respect to attack or appeal from the verdict and the order and judgment to be entered thereon.

Dated: New York, June 7, 1934.

ALFRED T. DAVISON
Attorney for Plaintiff.

THOMAS E. WHITE,
Attorney for Defendants.

So ordered:
CLARENCE G. GALSTON,
U. S. D. J.

Bill of Exceptions.

190

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC., *Plaintiff,*
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE, *Defendants.*
} L 52—110.

191

BE IT REMEMBERED that on the 4th day of May, 1934, this cause came on for hearing before the Hon. CLARENCE G. GALSTON, District Judge, and a jury of one, empanelled and sworn pursuant to stipulation of the parties made in open court, and reduced to writing in the stipulation dated May 7, 1934, and the following proceedings were had on May 4, 7, 8, 9, 10, 11, 14 and 15, to wit:

Appearances:

ALFRED T. DAVISON, Esq., Attorney for Plaintiff; by MARTIN A. SCHENCK, Esq., ORRIN G. JUDD, Esq., and RALPH C. WILLIAMS, Esq., of Counsel.

192

THOMAS E. WHITE, Esq., Attorney for Defendants; by JOSEPH F. MURRAY, Esq., of Counsel.

(Opening statements of counsel have been greatly abbreviated, and only short excerpts are printed for this record.)

Mr. Schenck: It is our view of the matter that Judge Bondy's opinion on those motions to strike out defenses constitute the law of the case.

The Court: Yes, that must be so.

193 The Court: When did you take over the possession of the building or control?

Mr. Schenck: There was a letter in respect of an agreement entered into with Central Park Properties in about the middle of January, 1931, giving us possession and control. So far as our legal possession and control, it did not come until through the foreclosure proceedings, but we got it about the middle of January.

Mr. Schenck: So that the rights of each party may be entirely protected, Mr. Murray and I have formulated a written stipulation in regard to the waiver of the ordinary jury and a trial before a 194 jury of one, and we have each signed this stipulation, with the names of the attorneys of record, and I think it would be a proper practice to have that filed and incorporated in the record.

The Court: It will be filed with the papers in the case.

The stipulation reads as follows:

IT IS HEREBY STIPULATED AND AGREED between the parties to this cause that the same shall be tried before a jury of one; and it is further stipulated and agreed that both parties shall be deemed at the conclusion of the trial to have moved for a 195 directed verdict, without reservation of any right to have any issue or issues submitted to the jury; and that neither party shall make any motion for the submission to the jury of any issue or issues.

Dated, New York, N. Y., May 7, 1934.

(Signed) ALFRED T. DAVISON,
Attorney for Plaintiff.

(Signed) THOMAS E. WHITE,
Attorney for Defendants.

196 PLAINTIFF'S CASE.

(Colloquy at beginning of case and opening statements are omitted.)

GORDON S. BRAISLIN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Schenck.

Q. Mr. Braislin, what is your present business? A. Vice-president of the Prudence Company.

Q. And during the period in controversy here what was your relationship to The Prudence Com-
197 pany? A. The same. Vice-president.

Q. That is, in September, 1929, and from that time to date, you were and are a vice-president of The Prudence Company? A. Yes.

Q. I show you what purports to be the original building loan agreement dated the 24th of September, 1929, and ask you what that document is (handing witness)? A. This is the building loan agreement between Central Park Properties, Inc., providing for this $6,650,000 loan on the building to be erected, now known as Essex House.

Mr. Schenck: I offer it in evidence.

198 (Marked Plaintiff's Exhibit No. 1.)

Q. I show you what purports to be the joint surety bond of the two defendants in this action, dated the 25th of September, 1929, and ask you if you recognize that as the original bond (handing witness)? A. Yes, this is the original bond.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 2.)

Q. Mr. Braislin, as vice-president of The Prudence Company was it one of your obligations to superintend the advances that were made under the building loan agreement that has just been offered in evidence? A. Yes, it was. 199

Q. And at the beginning of the period or about the time or at the time of the execution of the building loan agreement was a certain substantial advance made to Central Park Properties, the borrower? A. Yes.

Q. Was this advance made in the form of a number of checks to the order of persons approved or directed to be made by the Central Park Properties? A. Yes. 200

Q. I show you eight cancelled checks and ask if the first installment loan was made by virtue of those eight checks? A. Yes, it was.

Mr. Schenck: I offer them in exhibit as one exhibit, if that is satisfactory.

(Marked Plaintiff's Exhibit No. 3.)

Q. What does these amounts total? A. I believe it is $3,250,000.

Q. I show you a large folder in a yellow cover and ask you if that is the specifications on this job, which were approved by the Prudence Company on or about the time of the execution of the building loan agreement (handing witness)? A. Yes, these are the specifications. 201

Mr. Schenck: I offer them in evidence.

(Marked Plaintiff's Exhibit No. 4.)

Q. Now, I show you, Mr. Braislin, a roll of blue print plans stamped "Plans Approved Prudence Co., Inc., date 6/14/29", and ask you if those are

202 the plans which were approved by the Prudence Company on or about the date of the making of this building loan agreement? A. Yes, these are the plans.

Mr. Schenck: I offer them in evidence.

(Marked Plaintiff's Exhibit No. 5.)

Q. Mr. Braislin, as I recollect it, in the building loan agreement, there is a reference to a certain amendment to specifications required by the Prudence Company; I ask you if this document being two sheets, dated the 24th of September, 1929, constitute those amendments? A. Yes, these are the
203 amendments.

The Court: Those are amendments to the specifications?

Mr. Schenck: Amendments to the specifications. I offer them in evidence.

(Marked Plaintiff's Exhibit No. 6.)

Q. I show you a copy of a letter from Prudence Company to Central Park Properties, dated the 13th of September, 1929, and I ask you if the original of that was sent on or about that date to the Central Park Properties? A. Yes.

204

Mr. Schenck: I offer them in evidence.

(Marked Plaintiff's Exhibit No. 7.)

(Remarks of counsel are omitted.)

Q. I show you, Mr. Braislin, what purports to be a letter from Mr. Lefcourt to the Prudence Company, dated the 13th of September, 1929, and attached financial statement and ask you if that was received by your company (handing witness)? A. Yes, sir, it is.

Mr. Schenck: I offer the two documents in evidence. 205

(Marked Plaintiff's Exhibit No. 8.)

Q. I show you a copy of a letter dated the 14th of September, 1929, to Central Park Properties, attention Abraham E. Lefcourt, president, and ask you if the original was sent on or about that date (handing witness)? A. Yes, it was.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 9.)

Q. Reference has been made, Mr. Braislin, to a personal guarantee executed by Mr. Lefcourt. I 206
show you this document dated the 25th of September, 1929, and ask if that is such personal guarantee (handing witness)? A. Yes, this is a copy. But that is the guarantee, yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 10.)

Q. I show you a letter Central Park Properties, Inc., by L. Haas, secretary, to The Prudence Company, dated the 2nd of January, 1930, and ask if that letter was received (handing witness)? A. Yes, this was received. 207

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 11.)

Q. I show you a copy of a letter from Prudence Company to Central Park Properties, dated the 6th of January, and ask if the original was sent (handing witness)? A. Yes, this was sent January 6, 1930.

208 Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 12.)

Q. Mr. Braislin, in regard to this Plaintiff's Exhibit No. 12, this copy of a letter of the 6th of January, The Prudence Company is speaking of the approval of certain samples of face and court brick, and it states that those samples "has this day been approved by the committee." Were you a member of that committee? A. Yes.

Q. What was the purpose of that committee? A. That was a committee which passed on plans and specifications and passed on applications for
209 changes in them, for loans which The Prudence Company was making.

Q. I show you a copy of a letter of the 7th of January, the Prudence Company to Central Park Properties, and ask if the original was sent on or about that day (handing witness)? A. Yes, that was sent.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 13.)

Q. I show you a copy of a letter dated the 25th of January, 1930, from Prudence Company to
210 Central Park Properties, and ask if the original was sent on or about that day (handing witness)? A. Yes, this was sent.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 14.)

Q. I show you a two-page letter from Central Park Properties to Prudence Company, dated the 23rd of January, 1930, and ask if that was received (handing witness)? A. Yes, this was received.

Mr. Schenck: I offer it in evidence. 211

(Marked Plaintiff's Exhibit No. 15.)

Q. I show you a letter from Central Park Properties to Prudence Company, the 24th of January, 1930, and ask if that was received (handing witness)? A. Yes, this was received.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 16.)

Q. I show you a letter Central Park Properties to Prudence Company, the 24th of January, 1930, and ask if that was received (handing witness)? A. Yes. 212

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 17.)

Q. I show you a copy of a letter from Prudence Company to Central Park Properties, the 28th of January, 1930, and ask if the original was sent on or about that day (handing witness)? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 18.)

Q. I show you copy of a letter from Prudence Company to Central Park Properties, the 31st of 213
January, 1930, and ask you if the original of that was sent on or about that date (handing witness)? A. Yes, this was sent by us.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 19.)

Q. I show you a copy of a letter of the Prudence Company to Central Park Properties, the 4th of February, and ask you if the original of that was sent (handing witness)? A. Yes, we sent it.

214 Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 20.)

Q. I show you a letter of Central Park Properties to Prudence Company, the 3rd of February, 1930, and ask if that original letter was received (handing witness)? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 21.)

Q. I show you a letter from A. E. Lefcourt to Prudence Company, dated February 5, 1930, and ask you if you have received that? A. Yes.

215 Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 22.)

Q. I show you a copy of a letter from Prudence Company to Central Park Properties, dated the 15th of March, and ask you if the original of that letter was sent? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 23.)

Q. I show you a copy of a letter from the Prudence Company to Central Park Properties, dated
216 the 24th of March, and ask you if you received that letter? A. Yes, this was received.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 24.)

Q. I show you a letter Central Park Properties to Prudence Company, dated the 7th of April, and ask you if you received that letter? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 25.)

Q. I show you copy of a letter from Prudence Company to Central Park Properties, dated April 8, 1930, and ask you if the original of that was sent? A. Yes. 217

Mr. Schenck I offer it in evidence.

(Marked Plaintiff's Exhibit No. 26.)

Q. I show you copy of a letter from Prudence Company to Central Park Properties of the 10th of April, 1930, and ask you if the original of that was sent? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 27.) 218

Q. I show you copy of a letter from Prudence Company to Central Park Properties, dated the 10th of April, 1930, and ask if the original of that was sent? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 28.)

Q. I show you copy of a letter from Prudence Company to Central Park Properties, dated the 10th of April, 1930, and ask if the original of that letter was sent? A. Yes.

219

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 29.)

Q. I show you copy of a letter from Prudence Company to Central Park Properties, dated the 15th of April, and ask you if the original of that was sent? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 30.)

220 Q. I show you copy of a letter dated 15th of April, 1930, Prudence Company to Central Park Properties, and ask you if the original of that was sent? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 31.)

Q. I show you copy of a letter from Prudence Company to Central Park Properties, dated 21st of April, 1930, and ask if the original of that letter was sent?

Mr. Schenck: I offer it in evidence.

221 (Marked Plaintiff's Exhibit No. 32.)

Q. Now, Mr. Braislin, I show you a large piece of white paper, bearing date the 14th of March, 1930, and ask you what it is? A. This is a requisition submitted by Central Park Properties, Inc., asking for an advance on this building loan.

Q. There are certain ink figures upon this document and certain names written in ink; can you state whether those figures and those names were on the document when it came to you? A. Yes, all the ink figures on this requisition sheet were on the sheet when we got it; these pencil calculations
222 are our own.

Q. And those pencil calculations are based, so far as you know, upon the figures in ink upon the requisition sheet? A. Yes.

Q. Reference was made in what seems to be an earlier exhibit in this case, to your sending to Central Park Properties forms of requisition. As matter of fact is that document a printed form of the Prudence Company? A. Yes, this is one of our regular forms.

Q. And that is one of the documents sent in blank at the beginning of the loan by Prudence Company to Central Park Properties? A. That is correct. 223

Mr. Schenck: I offer that particular requisition sheet dated the 4th of March, 1930, in evidence.

By the Court.

Q. Is this the first of the requisitions received? A. Yes, I believe so.

Mr. Schenck: Yes, that is the earliest in date, I think, your Honor, and I presume it is the first received. 224

Q. Was that accompanied by an architect's certificate too? A. No, I think not. I think those were all we got.

The Court: Because I noticed, Mr. Schenck, the form calls for it.

Mr. Schenck: Yes.

(Marked Plaintiff's Exhibit No. 33.)

By Mr. Schenck.

Q. I notice, Mr. Braislin, that this form that has just been marked in evidence as Plaintiff's Exhibit 33, has a blank space for the certificate under the words "Certificate of Architect", and also has a form of affidavit, but that in neither case is the certificate made out or is the affidavit executed; can you tell me whether in all of the cases, all of the requisitions in this case, in accordance with your best recollection is true, that the Central Park Properties never furnished a certificate by an architect nor an affidavit in substantiation of 225

226 the requisition? A. That is my recollection. That was not done in any case.

Q. I also call your attention to the fact that this requisition is not signed by anybody, and I shall offer the other requisitions in a moment, but is that also your recollection with regard to other requisitions? A. Yes.

Q. None of the early requisitions, at any rate? A. Yes. I am not sure about these last ones.

Q. I shall make it a little bit more precise. None of the requisitions up to the time of the issuance of the certificate of occupancy were signed or executed or had an architect's certificate or any af-
227 fidavit in their support? A. That is my recollection.

By the Court.

Q. When you received these requisitions and noted that there was no accompanying architect's certificate or affidavit, did the Prudence Company call attention to that omission, or did you just waive it? A. I don't think we called any special attention to it.

By Mr. Schenck.

Q. At any rate, you never at any time by letter
228 or in accordance with your recollection, by oral demand, insisted that subsequent requisitions be certified by an architect and be supported by an affidavit? A. Not as I recollect.

Q. Now, I wish you would tell us the general practice of the Prudence Company with regard to what it did on the receipt of such requisitions from Central Park Properties in respect of any inspection or investigation on its part of the state of the building? A. These requisitions, when a

borrower wanted a payment, would send to me such a requisition made out, and I would get from our inspectors their latest reports. We had inspectors who probably, once a week, went to a building of this kind and made a report, giving the general progress of the work, generally trade by trade, and I would take the requisition and the report of our inspector the one against the other. 229

Q. Would your inspector be given this requisition, or would his view of the building be without this requisition? A. No, his would be an independent report.

Q. Now, speaking very generally, was it the practice of your inspectors in going to observe these different buildings to carry with them the specifications? A. No, it was physically impossible. 230

Q. I show you two checks of Prudence Company to the order of Central Park Properties, each appearing to be dated the 7th of March, 1930, one in the amount of $86,691.67, the second in the amount of $288,308.33, and ask if those constitute the instalment advance upon the requisition Plaintiff's Exhibit 33 (handing witness)? A. Yes, they do.

Mr. Schenck: I offer them in evidence. 231

(Marked Plaintiff's Exhibit No. 34.)

Q. Mr. Braislin, I show you ten requisition sheets, the first one being dated the 31st of March, 1930, and the last the 22nd of September, 1930, and ask you, if you will count them, if those are the ten additional requisition sheets between the first requisition sheet which has been offered in evidence and the last requisition sheet immediately preceding the issuance of the certificate of occupancy (handing witness)? A. Yes, they are.

232 Mr. Schenck: I offer them in evidence.

(Marked Plaintiff's Exhibit No. 35.)

Q. Among those documents which have just been offered in evidence and marked Plaintiff's Exhibit 35 there is a document which appears to be of a different dimension, and with typewritten rather than printed designations at the left. It is dated the 8th of September, 1930. Do you have any recollection as to the reason of the change of form, or any particular recollection in regard to that instrument (handing witness)? A. Yes, I believe they ran out of the other forms and sent
233 these in in this way, until we got the others.

Q. And as far as you know it has no other significance than that? A. No.

Q. I show you a bunch of checks, the first one dated the 4th of April, 1930. I think I shall itemize those by dates and amounts as I offer them. I show you the following checks of Prudence Company to Central Park Properties:

4 April, in the amount of $16,941.67; 4 April, $508,058.33; 2 May, $19,391.67; 2 May, $280,608.33; 23 May, 1930, $15,600; 23 May, $194,400; 20 June, $21,771.67; 20 June, $380,228.33; 11 July, $17,490; 11 July, $282,510; 1 August, $18,540; 1 August,
234 $191,460; 15 August, $12,858.33; 15 August, $77,141.67; 29 August, $13,068.33; 29 August, $61,931.67; 12 September, $13,243.33; 12 September, $31,756.67; 26 September, $13,348.33; 26 September, $106,651.67. I ask you if those checks which I have read were in payment of the requisitions which have just been offered in evidence (handing witness)? A. Yes, they are.

Mr. Schenck: I offer them in evidence.

(The 20 checks were marked Plaintiff's Exhibit No. 36.)

Q. The last requisition which I have shown you, Mr. Braislin, is dated the 22nd of September, 1930 (handing witness), and the last check that was offered in evidence is the 26th of September, 1930. Can you tell whether or not that last check was in payment of that last requisition? A. Yes, it was. 235

Q. I show you document dated the 6th of October, 1930, and ask you what that is (handing witness)? A. This is what we received on that date, one of our regular requisition forms, but instead of having any of the names of the contractors filled in or any figures simply this statement on it, and I might as well read it: "On October 3, 1930, the Bureau of Buildings of the Borough of Manhattan, City of New York, issued to Central Park Properties, Inc., the usual certificate of completion No. 16873, which is being delivered to you herewith, and we respectfully apply for the final payment due us amounting to $820,000 in accordance with agreement with you. Very truly yours, Central Park Properties, Inc., by Louis Haas, Treasurer." 236

Q. And the "Louis Haas, Treasurer" is signed by Mr. Haas, is it? A. Yes.

Q. On that particular document there are certain lead pencil figures over at the right-hand side. Can you say whether those were on it when received, or were they figures placed upon it after it was received? A. They were not on it when it was received. They are figures that our own people put on it. 237

Mr. Schenck: I offer this document in evidence.

(Marked Plaintiff's Exhibit No. 37.)

238 Q. I show you three additional documents, one dated the 13th of October, 1930, another dated the 20th of October, 1930, and a third dated the 3rd of November, 1930, and ask you what those documents are (handing witness)? A. These are similar documents. They are made out similar to our forms of requisition, and instead of having anything filled in in the way of names of contractors or figures, each has this similar statement requesting the final payment on this loan.

Q. And each recites the issuance of the certificate of what it calls completion, as the basis of the request? A. Yes.

239 Mr. Schenck: I offer them in evidence.

The Witness: It is a little different in wording. I can read this, too, if you like.

Q. I do not think that is necessary. A. All right. They each recite the certificate of occupancy has been issued and therefore the final payment is due.

(Marked Plaintiff's Exhibit No. 38.)

Q. At or about the time that these requisitions were sent to you, was there also sent to you as recited in the first requisition a copy of the certifi-
240 cate of occupancy? A. Yes.

Q. I show you this, which is not the identical document, but ask you if that is a copy of the certificate of occupancy (handing witness)? A. Yes, it is.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 39.)

Q. I show you a letter dated the 1st of November, 1930, Central Park Properties, by Melvin

Brown, it looks like, vice-president and Controller, to Prudence Company, and ask you if you received that letter (handing witness), and whether it enclosed one or more of these requisitions that you have just referred to? A. Yes, it did. 241

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 40.)

Q. Mr. Braislin, do you recollect after you had received these requisitions calling for a final payment, or rather final advance of loan, because of the fact that a certificate of occupancy had been obtained, consulting with Mr. Mark, the attorney for Prudence Company as to what action you should take? A. Yes, I do. 242

Q. And do you recollect being advised by him as to what action you should take? A. Yes.

Q. I show you letter of Fidelity & Deposit Company of Maryland by Allen Major Race, Manager Contract Department, addressed to the Prudence Company, attention of Mr. Braislin, and ask you if you received that letter on or about its date? A. I did.

Mr. Murray: What is the date?

Mr. Schenck: 17th of November. I offer it in evidence. 243

(Marked Plaintiff's Exhibit No. 41.)

Q. I show you a letter from American Bonding Company, Allen Major Race, Manager Contract Department, dated the 21st of November, addressed to you as Vice-President of the Prudence Company, and ask you if you received that letter on or about its date? A. I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 42.)

244 Q. I show you copy of a letter dated the 24th of November, 1930, from Prudence Co., Vice-President and General Counsel (the copy reads), to American Bonding Company, and ask if the original letter was sent on or about that date? A. Yes, it was.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 43.)

Q. Could you tell us, Mr. Braislin, who the Vice-President and General Manager of the company was? A. Yes, Mr. Henry Mark.

245 Q. Can you state whether or not his initial is at the bottom, the left-hand corner of the letter? A. Yes. I also saw the original of the letter after it was signed by him, because I sent that out.

Q. It was signed by Mr. Mark, the counsel of the company? A. Yes.

Q. And Mr. Mark has since died? A. Yes.

Q. Now, I call your attention to the fact, Mr. Braislin, that this letter of Mr. Race of the American Bonding Company, dated the 21st of November, which is Plaintiff's Exhibit 42, refers to "Our telephone conversation with you of the other day", and it goes on to say that he will be pleased to re-

246 ceive the certificate of occupancy; do you recollect what that telephone conversation was? A. Yes, I do.

Q. If you will, give it to us. A. I called Mr. Race, in answer to that letter, which was the exhibit before that one, and with one of our inspector's reports in front of me, I told him exactly what our reports had shown.

Q. Did you also tell him that the Central Park Properties had obtained the certificate of occupancy? A. Yes, that is how he knew about it.

Q. Now, I also call your attention to the fact that this letter of Mr. Race of the 17th of November, addressed to you, which is Plaintiff's Exhibit 41, states "The writer recalls that on June 11th, you informed us that the contract was at that time over 50 per cent. completed and progressing to your entire satisfaction"; do you recollect having some such conversation with him on or about the 11th of June? A. Well, I cannot remember that exact conversation, but whenever Mr. Race called, I always gave him whatever information I had as to what our reports showed. 247

Q. Do you recollect that he at any time telephoned you between the 11th of June, 1930, and this telephone conversation in the middle of November, 1930? A. No, I do not. 248

Q. I show you checks of Prudence Company to Central Park Properties of the following dates and in the following amounts:

10th October, 1930	$13,628.33
10th October, 1930	136,371.67
17th October, 1930	7,001.67
17th October, 1930	92,998.33
14th November, 1930	37,125.00
14th November, 1930	28,398.33
14th November, 1930	204,476.67
5th December, 1930	33,333.33
5th December, 1930	75,000.00
5th December, 1930	191,666.67

249

I ask you if those checks constitute the final advances of the loan? A. Yes, they do.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 44.)

Q. Mr. Braislin, during this period of time, that is, from the middle of October to and including

250 the 5th of December, did you have discussions with various people representing Central Park Properties as to the amount of advances you would make them? A. Yes.

Q. And during that same period of time, did you have a check made upon the general condition of the job by your inspector? A. Yes.

Q. And were reports made to you by this inspector of the general state of the job? A. Yes.

Q. And that inspector's name was what? A. Billsborrow.

Q. I show you three pages of a document purporting to be signed by R. E. Billsborrow, ad-
251 dressed to you, dated the 10th of November, 1930, and ask you if that is such a report?

Mr. Schenck: I ask that it be marked for identification.

The Witness: This is such a report, yes.

(Marked Plaintiff's Exhibit 45 for Identification.)

Q. I show you a similar document purporting to be made by Mr. Billsborrow to you, dated the 28th of November, 1930, and ask you if that is another such report? A. Yes, it is.

252 Mr. Schenck: I ask that it be marked for identification.

(Marked Plaintiff's Exhibit 46 for Identification.)

Q. I show you a list or estimate from Mr. Billsborrow, dated the 28th of November, 1930, and ask you if that is also such a report? A. Yes, it is.

Mr. Schenck: I ask that it be marked for identification.

(Marked Plaintiff's Exhibit 47 for Identification.) 253

Q. I show you what purports to be a similar report from Billsborrow to you, dated the 16th of December, and ask if that is also such a report? A. Yes, it is.

Mr. Schenck: I ask that it be marked for identification.

(Marked Plaintiff's Exhibit 48 for Identification.)

Q. And another list, dated the 16th of December, 1930, and ask you if that is also a report by Billsborrow of the same character? A. Yes. 254

Mr. Schenck: I ask that it be marked for identification.

(Marked Plaintiff's Exhibit 49 for Identification.)

Q. I show you a blue sheet, up at the top of which is printed "Inspection Report", and with five separate columns and ask you if that is or purports to be a summary of these different reports which have been marked for identification? A. Yes, it is.

255

Mr. Schenck: I ask that that be marked for identification.

(Marked Plaintiff's Exhibit 50 for Identification.)

Q. I show you copy of a letter dated 17th of December, 1930, from Prudence Company to Central Park Properties and ask if the original of that was sent on that date? A. Yes, it was.

256 Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 51.)

Q. At the time of your making the final advance of the 5th of December, did you receive from Central Park Properties this certificate which I show you? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 52.)

Q. I show you what purports to be a report of the New York Appraisal Department by Peter A. Weller, addressed to you and dated 29th of De-
257 cember, 1930, and ask you if you received that report? A. I did receive it, yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 53.)

Q. The New York Appraisal Department, that is a department of the Prudence Company, is it not? A. Yes.

Q. I show you another report of the New York Appraisal Department, by Peter A. Weller, addressed to you and dated the 5th of January, 1931, and ask you if you received such report (handing
258 witness)? A. Yes, I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 54.)

Q. I show you a copy of a letter purporting to be written by you to Charles C. Peters. This copy of letter is dated the 6th of January, 1931. Mr. Peters was the attorney for Central Park Properties, was he not? A. Yes.

Q. I ask you if the original of that letter was sent on or about that day (handing witness)? A. It was. 259

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 55.)

Q. Have you seen recently a copy of this agreement in regard to possession, or have you a copy of it in your possession? A. I have not seen one recently. I will see if we can locate it.

Q. I show you a letter Fidelity & Deposit Company of Maryland, by Allan Major Race, Manager Contract Department, addressed to The Prudence Company attention of Mr. Braislin, the 7th of January, 1931, and ask you if you received that letter (handing witness)? A. Yes, I did. 260

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 56.)

Q. I show you a copy of a letter purporting to have been written by you to Fidelity & Deposit Company of Maryland, and also to American Bonding Company of Baltimore, dated the 13th of January, 1930, and ask you if you sent the original by registered mail on or about the 13th of January, 1931 (handing witness)? A. Yes, I did. 261

Q. So that the recital of "1930" in that letter is a typographical error? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 57.)

Q. I show you a letter of Fidelity & Deposit Company of Maryland addressed to The Prudence Company, the 16th of January, and ask if you re-

262 ceived that letter (handing witness)? A. Yes, I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 58.)

Q. I show you a letter American Bonding Company of Baltimore, addressed to Prudence Company, of the same date, and I think in the same form, and ask you if you received that letter on or about the 16th of January (handing witness)? A. Yes.

Mr. Schenck: I offer it in evidence.

263 (Marked Plaintiff's Exhibit No. 59.)

Q. I show you a letter of the 14th of February, 1931, addressed to Fidelity & Deposit Company of Maryland, addressed to American Bonding Company of Baltimore, and addressed to Central Park Properties, and I ask if you sent on that date three such letters by registered mail, one to each of the parties addressed (handing witness)? A. Yes, I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 60.)

264 Q. I show you a letter from American Bonding Company by Allan Major Race, addressed to you, dated the 16th of February, and ask if you received that letter (handing witness)? A. Yes, I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 61.)

Q. I show you copy of a letter written by you, addressed to Fidelity & Deposit Company of

Maryland, addressed to American Bonding Company of Baltimore, and addressed to the Central Park Properties, dated the 25th of February, and ask if on that date you sent separate letters to each of those three parties by registered mail (handing witness)? A. Yes, I did. 265

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 62.)

Q. Mr. Braislin, the letter just marked in evidence, Plaintiff's Exhibit 62, sets forth a list and certain details in regard to work and the condition of the job on Essex House. Before writing that letter, had you received from this same Mr. Billsborrow certain reports on that same subject? A. I had. 266

Q. I show you what purports to be a report of Billsborrow to you, dated the 14th of February, 1931, and ask if that is such a report (handing witness)?

Mr. Murray: Before the question is answered may I ask Mr. Schenck whether or not Mr. Billsborrow is going to be produced here at the trial?

Mr. Schenck: Mr. Billsborrow will, if our opponents want him, certainly be produced at the trial; but I am not offering these reports in evidence because of their inaccuracy, I am marking them for identification. I am not vouching for their accuracy at all. I shall show they are entirely inaccurate, but I have no hesitancy in producing Mr. Billsborrow. 267

The Court: The point is these reports are going to be marked for identification and not in evidence?

268 Mr. Schenck: Yes.

A. This is such report, yes.

Mr. Schenck: I offer it for identification.

(Marked Plaintiff's Exhibit No. 63 for Identification.)

Q. I show you a similar report from Mr. Billsborrow to you, dated the 20th of February, and ask if that is likewise a similar report (handing witness)? A. Yes, it is.

Mr. Schenck: I ask that that be marked for identification.

269

(Marked Plaintiff's Exhibit No. 64 for Identification.)

Q. I also show you what purports to be a third such report, dated the 24th of February, 1931, this particular report addressed to Mr. Goodnough. Mr. Goodnough is in the Legal Department of The Prudence Company, is he? A. Yes.

Q. And is it your recollection that a similar report of the same date was made to you? A. Yes.

Q. The 24th of February (handing witness paper)? A. Yes, I had a copy.

270

Mr. Schenck: I ask that that be marked for identification.

(Marked Plaintiff's Exhibit No. 65 for Identification.)

Q. I show you a copy of a letter dated the 31st of March, 1931, purporting to have been signed by you as vice-president, addressed to Fidelity & Deposit Company of Maryland and also addressed to American Bonding Company of Baltimore, and ask if on that date you sent and delivered to those

two parties two such letters (handing witness)? A. Yes. 271

Q. One to each? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 66.)

Q. Now this is a letter from you, addressed to Fidelity & Deposit Company of Maryland, American Bonding Company of Baltimore and Central Park Properties, dated the 11th of April, 1931. Did you on that date send such a letter by registered mail to each of those three parties (handing witness)? A. I did. 272

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 67.)

Q. I show you a letter dated the 10th of June, from Fidelity & Deposit Company, Albert E. Hart, attorney, addressed to Prudence Company, and ask if you received that letter on or about its date (handing witness)? A. We did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 68.)

Q. I ask if you received this letter in the same form, dated the 10th of June, from American Bonding Company, by Albert E. Hart, attorney (handing witness)? A. Yes. 273

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 69.)

Q. I show you a copy of a letter from you, signed by you on behalf of The Prudence Company, addressed to Fidelity & Deposit Company

274 of Maryland, American Bonding Company of Baltimore and Central Park Properties, dated the 24th of June, and ask you if on that date you sent by registered mail one such letter to each of those three parties (handing witness)? A. I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 70.)

Q. Mr. Braislin, I show you copy of a letter purporting to have been sent by you as vice-president, addressed to the Fidelity & Deposit Company of
275 Maryland, also addressed to the American Bonding Company of Baltimore, and also addressed to the Central Park Properties on the 9th of June, 1931, to which is attached a list consisting of six separate sheets of paper, and ask you if you wrote such a letter and sent it to each of those parties on that date and if, with the letter were copies of these lists of some six pages? A. Yes, I sent a letter to each of those parties with one of these schedules in each letter.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 71.)

276 Q. I show you a letter purporting to have been written by you to the Fidelity & Deposit Company of Maryland, the American Bonding Company of Baltimore and Central Park Properties, dated the 6th of July, to which is attached two sheets of paper dated the 30th of June, 1931, and ask you if on that date you sent such a letter to each of the three parties, and each letter enclosed copies of the list? A. Yes, I did.

Mr. Schenck: I offer that in evidence.

(Marked Plaintiff's Exhibit No. 72.)

Q. I show you a letter from Fidelity & Deposit Company of Maryland, by Albert E. Hart, attorney, addressed to the Prudence Company, dated the 8th of July, and ask you if you received that letter? A. Yes. 277

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 73.)

Q. I show you a letter, apparently in the same form, from American Bonding Company, by Albert E. Hart, of the same date, 8th of July, 1931, and ask you if you received that letter? A. Yes.

Mr. Schenck: I offer it in evidence. 278

(Marked Plaintiff's Exhibit No. 74.)

Q. I show you a letter from the American Bonding Company, by Albert E. Hart, attorney, addressed to Prudence Company, dated the 3rd of September, 1931, and ask you if you received that letter? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 75.)

Q. This is a certificate of Prudence Company, dated the 5th day of December, 1930, by Alexander Johnston? A. Yes. 279

By the Court.

Q. Who is Alexander Johnston? A. He was one of our law department—an attorney who handled most of the legal work in connection with these matters.

Mr. Schenck: I now offer it in evidence.

(Marked Plaintiff's Exhibit No. 76.)

280 *Further direct examination by Mr. Judd:*

Q. What time of the year was it when the Prudence Company obtained possession of this building? A. You mean whether it was in the winter time? Yes, it was.

Q. What arrangements were made for heating the building? A. Heat was supplied by the New York Steam Company, and we had to make arrangements with them to supply steam heat so that there would be no frozen pipes or other damage done.

Q. I show you eight checks; one dated January
281 10, 1931, in the sum of $3,615.78; February 21, 1931, $3,018.97; March 5, 1931, $4,107.72; April 6, 1931, $2,157.08; May 4, 1931, $381.31; June 19, 1931, $161.46; July 16, 1931, $102.50, and August 7, 1931, $102.60, all to the order of the New York Steam Corporation.

Mr. Murray: May I make a statement at this time, your Honor?

The Court: Yes.

Mr. Murray: I do not wish to be captious. I wish this case to be tried as simply as possible. I assume that these are checks in support of allegations of the payments claimed
282 to have been made, and I would like it understood for simplicity's sake, that I have no objection to their stating that they made this, that or the other payments, so long as it is understood that I am not admitting that the payments were proper or necessary or that they have any proper claim for them against the defendants.

The Court: Obviously whatever proof is introduced, you will not be precluded by such

proof; it is your privilege to meet it or overcome it. 283

Mr. Murray: The only thing I had in mind was that if I wanted to be technical, I should say that the propriety of the claims be first proven.

The Court: The witness has already stated that in order to avoid frozen pipes, that this steam was provided for. That might cover the period up to spring, but many of these checks, of course, run right into the warm weather and it would appear in that statement of necessity that there was no need for incurring the expense in those months. 284

Mr. Murray: I was not limiting myself to those particular checks, your Honor.

The Court: The general trend, I understand, all right.

Mr. Schenck: If I may say a word in that connection, we appreciate Mr. Murray's attitude in that respect, and we shall attempt to supply the necessity for the payment at the time the payment was made.

The Court: As I understand it, the necessity by this present list merely is that these expenses were made necessary in the winter months to avoid frozen pipes. 285

Mr. Schenck: Yes. There is one further that has not been called to your attention, which I may mention at the present time, and that is, the complaint is drawn under the principles set forth in section 255A of the Civil Practice Act, which allows, under certain circumstances for the plaintiff to attach schedules of damage and schedules of items of expenditure to the bill of complaint, and

286 then requires the defendant to make a specific denial in order to put those expenditures in issue. That is one of the points on the memorandum of law that I have submitted. We are not insisting upon that practice; we are going to introduce a prima facie case in regard to all these expenditures, and I think the trial may be somewhat shortened if we be allowed a little latitude in proving the items so that we get down as quickly as possible to whatever items may be in dispute.

The Court: That seems to be agreeable to Mr. Murray. Indeed, he does not in his present position indicate any denial that you made 287 the payments, but raises the question as to their necessity.

Mr. Schenck: Yes, Mr. Murray need not be in any way precluded by this.

Mr. Murray: I would like to have some understanding, if I may, on this question of 255A. If your Honor will remember, this section has a provision where in the case of goods sold and delivered or any materials furnished and a schedule is attached to the complaint, the defendant's general denial of the allegation in the complaint that the services were 288 rendered and the materials furnished, does not constitute an issue, but that in order to constitute an issue, it is necessary to plead as to each individual item in the schedule. Now, I have proceeded upon the assumption and still claim that that section does not apply to our case where materials were not furnished to us and where the services were not rendered to us, but naturally, if advantage were to be taken of that section at this time,

I should like to amend the answer to plead as to each one of those items. 289

The Court: I think you better do that, of course. In the section, I find that it covers not only the sale and delivery of the goods but also the rendering of labor, work and services.

Mr. Murray: Rendering, your Honor.

Mr. Schenck: That point that Mr. Murray raises has been determined against his contention.

Mr. Murray: Then I would like to amend the answers now, so as to specifically deny the propriety— 290

The Court: The necessity?

Mr. Murray: The necessity of these services and this work.

The Court: Without raising an issue as to the reasonable value thereof or the payment?

Mr. Murray: Yes. That also is an issue in certain respects, your Honor, in a certain few items.

The Court: Under the practice, you want to specify those items?

Mr. Schenck: I don't think Mr. Murray can deny each and every item of this claim, which mounts up to some $400,000. I think 291 it might be feasible for him overnight to go over this,—if he will go through our schedules in the meantime—

Mr. Murray: I will be glad to do that.

The Court: I think we better proceed that way and Mr. Murray will be prepared tomorrow to amend his answers in the particulars set forth

Mr. Murray: Yes, your Honor.

292 A. These are the checks in payment of these steam bills.

Q. I call your attention to the vouchers supporting the checks, dated July 16th and August 7th, particularly the line which reads "minimum bill". A. Yes, sir.

Q. I ask you if you can explain the necessity of steam payments for steam during the months of June and July? A. Yes, sir. If you do not pay the minimum bill you lose your connection, and if you lose your connection you have to get a new contract, and then you lose the benefit of the rest of the year at the lower rate.

293 Mr. Judd: I will mark in evidence now the eight checks.

(Marked Plaintiff's Exhibit No. 77.)

Q. Certain of those checks, Mr. Braislin, are checks of 58-59 Realty Corporation? A. Yes, sir.

Q. And others of The Prudence Company. Can you tell us what the 58-59 Realty Corporation was? A. That was a corporation formed to take title to this property.

Q. Who owned its stock? A. The entire stock is owned by Amalgamated Properties, Inc., whose stock in turn is owned by The Prudence Company.

294 Q. So that the 58-59 Realty Corporation was a subsidiary of The Prudence Company? A. Yes, sir.

Q. Was it necessary to have electric current in the building in connection with the construction and completion of the items which were referred to in the notices to the surety company? A. Yes, it was.

Q. I show you five checks to the United Electric Light & Power Company, dated January 30, 1931,

in the sum of $1,878.24; May 22, 1931, $31.64; June 19, 1931, $834.56; July 21, 1931, $1,202.32; August 19, 1931, $1,137.12. I ask you if you can identify those checks and the vouchers (handing witness)? A. Yes, sir; those are the checks for payment of the electric current. 295

Mr. Judd: I offer those checks in evidence.

(Marked Plaintiff's Exhibit No. 78.)

Q. I show you a receipted bill of Marks Bros., Inc., dated January 10, 1931, in the sum of $345.26. I ask you if you can explain that bill and what it is (handing witness)? A. Yes, this is for replacement of broken glass in the building. It still being wintertime, that was necessary to keep the cold out, also to prevent freezing. 296

Mr. Judd: I offer that in evidence.

(Marked Plaintiff's Exhibit No. 79.)

Q. I call your attention, Mr. Braislin, to the items in the complaint as to expenditure for electric current and for steam, items 18 and 34 of Schedule A (handing witness), which are somewhat different in period covered and total amount claimed from the vouchers which have been introduced. A. Yes. 297

Q. I ask you if you can tell us the difference between the checks and vouchers which have been introduced and the amounts claimed in the complaint? A. We are claiming in the complaint only those items which were directly a result of the state of the building itself and—

Q. I call your attention to the date of the items claimed in the complaint. A. Well, it is April 4th to October 2, 1931, and there are some items in these checks which are prior to that time.

298 Q. Did you prepare the schedules which are annexed to the complaint? A. No, I did not prepare them myself. Our company prepared them. The same is true of the steam bill. That begins March 1st, and there were payments of steam bills prior to that time.

Q. And those payments of steam bills were necessary in order to preserve the building and prevent freezing of pipes, as you have testified? A. No question about it.

The Court: Mr. Judd, am I to understand that checks constituting Exhibit No. 77 cover
299 the items of payment shown in the classification 34 of Schedule A, and that Exhibit No. 78, the five checks, includes payments listed in the item 18 of Schedule A?

Mr. Judd: Yes. The amounts do not correspond exactly, but it is our position that the variance is not a material one. It is caused by the fact that the vouchers had not been examined by the man who prepared these schedules and the payments which were made before Bing & Bing took possession of the building were not included in the schedules of electric current and steam.

300 The Court: Perhaps I ought to put my question a little differently. Is it your contention that Item No. 18 is proved by the Exhibit 78?

Mr. Judd: Well, we have introduced checks totalling $5,083.88.

The Witness: There are more checks than are shown.

Mr. Judd: We have not proved the months of August and September.

The Court: Then you will have to give additional proof in order to show payment of Item 18; is that right? 301

Mr. Judd: We intend to withdraw those claims.

Mr Schenck: We have withdrawn those because it was so close to the end of the completion operation that we thought those expenses were more properly attributable to the expense of running the building than to completion.

The Court: Are you withdrawing 18 and 34?

Mr. Judd: No, we are withdrawing the last two months charged in 18 and 34. 302

The Court: Then your proof will be a modification of 18 and 34?

Mr. Schenck: Yes.

Mr. Judd: Yes, your Honor. Your Honor will note the amounts spent for steam and electricity rise considerably in August and September, on both those items, when the building was being made ready for tenants, and we thought it was impossible to apportion the amount for those months.

Mr. Murray: Along the same line that was going through your Honor's mind, the steam consumption, the item of 34, is for $1,686, and I think the totals of these steam checks are considerably in excess of that. 303

Mr. Judd: The total is $13,647.42.

The Court: Thirteen thousand dollars?

Mr. Judd: $13,647.42.

The Court: You are not planning to get an allowance in excess of what you claim here in your complaint, are you?

304 Mr. Judd: We are, your Honor. The steam payments were required in the completion of the building, and we have alleged in general terms our damage through the failure of the Central Park Properties to complete. We did not have those vouchers and did not know of the payments at the time the complaint was drawn.

Q. Under what item of Schedule A did you get your thirteen thousand dollars, or does it appear there in Schedule A?

305 Mr. Judd: The thirteen thousand does not appear in Schedule A, but it is part of our general damages alleged in the complaint.

The Court: You cannot get it twice, can you?

Mr. Judd: No, we are not asking for it twice.

The Court: Then are you withdrawing 18 and 34?

Mr. Judd: We ask that Item 18 be amended to show the amount of our present claim as $13,647.42.

The Court: That is Item 18?

306 Mr. Judd: Items 18 and 34, the item of steam consumption.

The Court: What have you to say about that?

Mr. Murray: On the same question of not wanting to be technical, I presume if they move to amend I will have no objection to it.

The Court: Then the motion to amend Item 34 is granted.

Q. I show you a check, Mr. Braislin, to the order of Holmes Electric Protective Company, in

the sum of $502.11, dated April 7, 1931, and ask you if you can identify that check and tell me what its purpose was (handing witness)? A. I can. We employed this company to keep watchmen at this building prior to this period and subsequent to the time that we took it over. 307

Q. And that is the charge for their services as watchmen? A. It is the charge for their service, for keeping watchmen there.

Mr. Judd: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 80.)

Mr. Murray: As I read the complaint, your Honor, the damages which they claim are a total of the items listed in the two different schedules: Is that right, Mr. Judd? 308

Mr. Judd: There are schedules annexed to the complaint which shows our expenses in completion as we understood them at the time, but the complaint alleges in general terms the amount of our damages. This item of Holmes Electric Protective Company is not specifically set forth in the complaint.

Mr. Murray: As I read the complaint the total amount demanded is the total of those sums which are set forth in the schedules. 309

The Court: In the two schedules.

Mr. Murray: In the two schedules.

The Court: There are two causes of action: Is there a recovery sought under each cause, exclusive of the other?

Mr. Judd: No, the total recovery sought is not greater than the highest amount claimed, which is in the second cause of action, and this check to the Holmes Electric Protec-

310 tive Company does not increase the amount of our claim beyond the amount demanded in the damage clause.

Mr. Murray: I really cannot understand it yet, your Honor. The claim is that the plaintiff has expended for completion one hundred and sixty-six thousand and some odd dollars, which is the total of the items of Schedule A.

The Court: That is right: That is Item A.

Mr. Murray: Then the second claim is that there are omissions of labor and materials,
311 totalling two hundred and twenty-eight thousand and some odd dollars. That is Schedule B. Now apart from those two items, and interest which they allege as 3 and fees of supervision which is 4, and taxes which is 5, and taxes which is 6, and insurance which is 7, there is no general allegations of damages as I read the complaint.

Mr. Judd: There is an allegation in Paragraph XXXVII, that by reason of the defaults of Central Park Properties and the defendants the plaintiff has been damaged in
312 the sum of $788,676.94. This is part of the damages which we have suffered.

Mr. Schenck: If your Honor please, the complaint was drawn on the theory that we would attach, as we had given lists of these claimed items of incompletion as we ascertained them, and as we notified them as to when Bing & Bing were going to make their inspection, and ask that they go if they so desired and join in that inspection. So that

our complaint would be based upon the same theory and attach these detailed items of damage so that we would know just exactly what they would admit and what they would deny. Instead of doing that they put in a general denial of the items. They did not follow our suggestion of getting down to specific items. And so when we came to prepare the case for trial we considered ourselves at full liberty, inasmuch as the complaint contained a general allegation of damage, to make any corrections that further investigation showed might be appropriate, and also to add any items for this list of incompletion and list of damage that was prepared by Messrs. Bing & Bing, in regard to expenditures before that time, including steam and including watchmen's service. It seems to me if the defendants are going to attempt to restrict us to the exact form of these schedules—

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The Court: I think what he is doing thus far, which is the very thought that is going through my mind, is endeavoring to reconcile the schedules with the general claim of damage. For example, he wants to know, and so do I, where this item of Schedule B, $228,722.78 fits in with the items of Paragraphs 1 to 6 forming part of Paragraph XXXXI of the complaint. That is your position, is it not?

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Mr. Murray: That is exactly my position, your Honor.

The Court: In Paragraph XXXXI your claim that the plaintiff has been damaged in the sum of $950,706.68, and you follow that

316 with six items, the total of which I understand is that sum which I have just stated. Schedule A is covered in the first item of that Paragraph XXXXI. Where is the Schedule B, and where does it fall?

Mr. Schenck: We alleged that we made certain expenditures in completion, and the sum total of those expenditures in completion, and expenses in completion—I do not remember the exact figure, but we will say we state on our schedule and show on our schedule they are $166,000.

The Court: That is covered.

317 Mr. Schenck: Made up of specifically stated items.

The Court: Yes.

Mr. Schenck: In an attempt to avoid a general issue. Our opponents do not follow that practice, and do not join in admissions and denials of those expenditures.

The Court: This complaint, after all, was drawn before you knew what your opponent was going to do.

Mr. Schenck: Yes.

The Court: Let us not worry about their practice, but what I want to do is to check

318 up this Schedule B with some item 1 to 6 of the final paragraph of your complaint. Where does it fall?

Mr. Schenck: I am just saying about the sum total of these expenses we claim in view of the defendants' answer we are now at liberty to withdraw any item of expenditure, to add to any item of expenditure, and to give, for instance, if there is an item of expenditure before Messrs. Bing & Bing—

The Court: Let us say that that is so, without attempting to argue it. Let us assume you are correct in that respect. My question and Mr. Murray's question are not answered. Paragraph XXXXI, Items 1 to 6. The last paragraph before the "Wherefore" clause. 319

Mr. Schenck: I would say that this particular item, the second cause of action being on a different theory, is not within any of those allegations of the second cause of action.

The Court: Then let us get to the first cause of action.

Mr. Schenck: I want to be perfectly fair in the matter. My point is that where we allege in our first cause of action that we have made expenditures— 320

The Court: Just refer me to the paragraph number.

Mr. Judd: Paragraph XXXVII.

Mr. Schenck: Paragraph XXXVII: "That by reason of the defaults of Central Park Properties and the defendants hereinabove set forth, this plaintiff has been damaged in the sum of $788,676.94, with interest thereon as hereinafter set forth."

The Court: Yes, and then in the second subdivision of that paragraph you find the figure $228,722.78, which is the Schedule B annexed to the complaint. 321

Mr. Schenck: Which is Schedule B, but the matter I had in mind was the subdivision 1: "This plaintiff has expended for completing said building to the extent of making same ready for occupancy the sum of $166,054.29." Now we attach a schedule.

322 The Court: That is Schedule A. That is clear.

Mr. Schenck: Inasmuch as those items of expenditure have had issue joined upon them, we claim, whether an amendment of the complaint or not is necessary, that we may now, so long as we do not exceed that figure, withdraw any item or amend any item or add any item of actual expenditure. That is what we are doing now.

The Court: No.

Mr. Schenck: We are now attempting to get an expenditure for the Holmes Patrol,
323 an expenditure which is not itemized in this list at all; and the bond specifically allows us that expense. It is true we have not pleaded it, and it is true that if the defendants joined issue with us on our general form of complaint and specifically admitted this item or that item, all of the items that are admitted would be thrown out of the case, we would be litigating the items that they denied, and they might well say this item of three thousand dollars or whatever it is for watchman, we being so specific they are going to hold us to
324 our specification and say we cannot amend. But I do not think they are in that position now.

The Court: I do not think he has raised the point. He is not arguing that. He is trying to fit the crossword puzzle together, as I was, and it now appears that Schedule B forms part of your first cause of action.

Mr. Schenck: Yes.

The Court: And cannot be tied in so far as I can see with your second cause of action.

Mr. Schenck: That is correct. But the 325
particular schedule that we are now discussing, that is the expenditures, is Schedule A. Those are items of expenditure in completion, and among those we claim is this expense of watchmen properly included. Schedule B is estimates and valuations.

The Court: That is clear.

Mr. Murray: If there had been a specific allegation in the complaint of $166,000 plus of expenses, your Honor, we would be entitled to a bill of particulars having those items specified.

The Court: He gave you that. 326

Mr. Murray: Immediately on the institution of the action. We have relied upon this and I think there should be some limit to the additional items.

The Court: I think Mr. Schenck introduces a tenable law proposition when he says inasmuch as there has been no denial of the specific items set forth he may modify by subtraction or addition. I will say to both counsel that I am going to give considerable leeway in respect to amendments of the pleadings, since there is no jury here.

Mr. Murray: That is what I would like to 327
have you do, your Honor, because I firmly believe that 255-A has no application to the case of a surety to whom no material was delivered and for whom no services were performed, and that the intent of that Section was to hold you when I sold something to you or I did something for you under a contract, and you ought to know those things.

328 The Court: The view that I now take of it is that you are bound by that practice. However, if you want to show me authority by tomorrow morning I will be glad to look at the cases.

Mr. Murray: All right, your Honor.

Mr. Schenck: I think we might also say that there will be during our proof some modification of these schedules, all, however, within the sum total of the complaint, and we shall proceed in regard to it with as much clarity and as much fairness as we possibly can to our opponents, and we shall give our
329 opponent lists so that he may have full opportunity of cross examining in regard to it.

The Court: I think, for example, at the conclusion of the session this afternoon if there are any substantial additions to either Schedule A or B, you ought to let Mr. Murray have them, so he will know where he is at.

Mr. Schenck: We shall do so. There will be no additions to the sum totals. There will be some modifications of the items within those sum totals.

Q. Mr. Braislin, the building loan agreement in
330 one of its clauses required the borrower to maintain adequate fire insurance on the premises. Did The Prudence Company continue payment for fire insurance after Central Park Properties had defaulted? A. Yes, it did.

Q. I show you checks to the order of the Remsen Brokerage Company, as follows: $2,035.44, dated May 18, 1931; $1,120.83, dated July 24, 1931, and $1,029.17 dated September 10, 1931, together

with vouchers. I ask you if those are checks for 331
insurance on the building (handing witness)? A. Yes, they are. They are all fire insurance, except one which is for elevator liability and the other is for sprinkler leakage damage.

Q. Have you stated the date of completion of the building? Have you stated the date when the building was actually completed? A. No, I did not state that.

Q. Will you give us that date? A. The building was not actually completed until the following Fall. I think in October, 1931.

Q. Can you tell me how much of these checks (handing witness) for insurance is apportionable 332
to the period ending October 1, 1931? A. It is not here. It has doubtless been calculated.

Q. I think it is calculated on one of those sheets (indicating). A. Oh, yes. $1,640.87, is the pro rata share through October 1, 1931.

Mr. Judd: I offer those checks in evidence.

(Marked Plaintiff's Exhibit No. 81.)

Q. Can you tell me whether taxes were paid by The Prudence Company on this building during the period at issue? A. Yes, they were.

Q. I show you checks to the order of the City 333
Collector, dated May 28, 1931, and November 28, 1931, each in the sum of $38,080, and ask you to identify those (handing witness). A. Yes, those are the checks with which payments of taxes were made.

Q. Can you tell me what period those checks cover? A. Together these cover the calendar year 1931.

334 Q. So that the amount attributable to the period ending October 1, 1931— A. Is three-quarters of the total.

Mr. Judd: I offer those in evidence.

(Marked Plaintiff's Exhibit No. 82.)

Q. Can you give us the definite amount of that, Mr. Braislin for the first half, and for the three months of the second half before the building was completed? A. $57,120.

Q. That is the total for the nine months? A. Yes.

335 Q. Was there a telephone connection in the building prior to its completion? A. Yes.

Q. Was it there when The Prudence Company took it over? A. I am not sure offhand whether we had to have a new one installed; I know we had one shortly after we took it over.

Q. I show you a check in the sum of $15.60, and ask you if you can identify that? A. Yes, that is in payment of a telephone bill rendered February 1, 1931.

Mr. Judd: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 83).

336 Q. Mr. Braislin, can you tell me the amount which was due on the building loan agreement on December 16, 1930,—the amount due to The Prudence Company? A. $6,650,000.

Q. Was any payment received on account of the principal? A. The $75,000 deposited, which was deposited with us under the agreement, which is now in evidence, was at a later date applied on account of principal. Other than that, no payment on principal has ever been received.

Q. Was any interest received from Central Park Properties, Inc. prior to October, 1931? A. Except for those interest items which were deducted from payments during construction. 337

Q. Was any? A. After the last advance was made, no interest was received.

Q. So that The Prudence Company was deprived of interest on this sum of $6,650,000? A. Yes.

Q. From the time of the final advance to October 1, 1931? A. That is correct.

Q. Can you tell me what the amount of that interest was? A. I will try to calculate it for you, unless you have it already calculated. 338

Q. I call the witness's attention to item, subdivision 4, I believe it is paragraph 37 of the complaint? A. $325,462.50.

Mr. Judd: That is all.

Cross examination by Mr. Murray.

Q. What was your duty at The Prudence Company, Mr. Braislin, in and prior to September, 1929; what duties did you perform? A. Well, I had charge of the making of the building advances on all building loans. I don't know whether you are interested in my other duties,—I suppose that is all you want to know. 339

Q. What other duties did you have? A. I had charge of the mortgages in Brooklyn, Queens and Long Island at that time. Those were my two duties there.

Q. Did you pass upon the propriety of making loans— A. In those boroughs, not in New York.

Q. And not in New York? A. No.

340 Q. Did you have anything to do in connection with the making of this particular loan to Central Park Properties? A. Nothing at all.

Q. When did you first hear of the matter? A. When the letter of acceptance was signed and when it went around the company; that is the first notice I had.

Q. What is a letter of acceptance? A. That is an agreement which embodies in a brief form what later goes into the building loan agreement.

Q. I show you this instrument and ask you whether you recognize that (handing witness)? A. This is a letter of acceptance. It looks to me
341 like the copy of the one that was signed in this case.

Mr. Murray: I offer it in evidence.

(Marked Defendants' Exhibit A.)

Q. Will you tell me specifically, Mr. Braislin, whether you had any duties to perform whatsoever, in respect to this letter of acceptance, as you call it, or "loan acceptance" as it is marked here? A. Nothing other than to prepare for the making of the advances. The plans and specifications were sent to the inspection department, which I
342 also supervised, and inspectors were prepared to make their inspections.

Q. You had charge of the inspection department? A. Those men were under me.

Q. They were under you. You had general supervision over them? A. That is correct.

Q. Did you employ them? A. Did I hire them, do you mean?

Q. Yes. A. No.

Q. Did you have the right to discharge them? A. Yes.

Q. Who, under you, was in charge of the inspection department? A. Mr. Walters and later Mr. Billsborrow. Mr. Billsborrow took Mr. Walters' place during the course of this loan. 343

Q. And what was the time when Mr. Walters left The Prudence Company? A. I cannot give you the exact date.

Q. Can you approximate it? A. Yes, I think I can. It was during the summer of 1930—the late summer, I should say.

Q. And who appointed Mr. Billsborrow to Mr. Walters' vacant place? A. I did.

Q. How long had Mr. Billsborrow been with the company? A. About three years. 344

Q. How long had Mr. Walters been with the company? A. I think not as long as that; I think a year and a half or two years.

Q. Do you know what qualifications Mr. Walters had? A. He was an engineer, and I think he had been on several building jobs actually himself as building superintendent; he knew building construction.

Q. And do you know what Billsborrow's qualifications were? A. Very similar. He also had been a building superintendent and was an engineer.

Q. When this loan acceptance was executed, Mr. Braislin, did you familiarize yourself with the history of any negotiations leading up to the making of the loan? A. In a general way, yes. 345

Q. Do you know when Mr. Lefcourt first approached The Prudence Company on this loan? A. No, I do not.

Q. Who, in your organization would know? A. I should say Mr. Bigelow.

346 Q. What were Mr. Bigelow's duties? A. He was in charge of the negotiating of loans in Manhattan.

Q. Was it Mr. Bigelow who negotiated this loan? A. Yes, he followed it all the way through.

Q. So that the duties which you performed as regards Brooklyn and Long Island, Mr. Bigelow performed as regards Manhattan, is that correct? A. Yes, in general.

Q. And do I understand that in addition to those duties, you also had to do with the making of the advances even on loans made in Mr. Bigelow's territory? A. Yes. My position in Brook-
347 lyn and Queens was not quite the same as his, because I had charge of it and did a good deal of deciding in Brooklyn,—much more than he did in New York. I had a lot of people who did negotiating in Brooklyn.

Q. You did the deciding? A. I did part of it, yes.

Q. Did Mr. Bigelow do negotiating and deciding? A. Not as much. In each borough we had a loan committee which passed on loans, making loans, and Mr. Bigelow would report to that committee the result of his negotiations, on what basis he could close loans and get their approval or
348 disapproval.

Q. Were you limited in that manner in your territory? A. Yes, we had a committee, too.

Q. Was there any general bases upon which loans were made by The Prudence Company, as to the proportion of the value of the property? A. I don't think there were, no. There was basis on the amount of the loan that we made, but the making of any loan, is a matter of a man's judgment. We had our committee, and they passed on loans,

if the collateral was good security, otherwise they would not make the loan. 349

Q. And then do I understand properly, Mr. Braislin, that you had nothing whatsoever to do with the preparation or execution of this Defendants' Exhibit A? A. Nothing at all.

Q. Did you have anything to do with the approving of the specifications in this matter, Mr. Braislin? A. Yes, I did. I did not have anything to do with the passing of the specifications that were referred to in the loan, but I was on the committee that considered the modifications in those specifications.

Q. Do you know the specifications which were referred to in the loan acceptance agreement? A. Yes. 350

Q. And are they the same specifications which were identified this morning as the specifications upon which the loan was granted? A. Yes.

Q. You were familiar with the specifications? A. I was familiar with the applications that were made for modifications in them, because they came up before the committee, of which I was a member.

Q. Before this loan was granted, do you know whether these specifications and the plans which have been marked in evidence, were handed to your inspection department? A. I believe they were, yes. 351

Q. And after the loan was granted, did you familiarize yourself with the specifications? A. Do you mean did I sit down and read them? No.

Q. Did you acquire knowledge of the contents of the specifications? A. I acquired a knowledge of whatever there was a question to decide, because that came up before the committee. It was

352 the duty of the engineer in charge of the inspectors to see that the specifications were submitted to him. He looked at them, of course. He considered changes that were applied for, and brought those applications up before this committee, which considered them.

Q. Did you ever discuss, in connection with this particular matter, the specifications with your engineering department or inspection department? A. We had many meetings to decide these questions, which resulted in a good many of these letters that were put in evidence this morning.

353 Q. When any question arose, who had charge—the physical charge of the specifications? A. Mr. Walters and later Mr. Billsborrow.

Q. And from time to time, did you see these specifications produced before meetings? A. Oh, yes.

Q. What was Mr. Walters' duty in connection with this particular loan? A. He was in charge of this inspection department, and the reports which his inspectors made to him, he would go over with them and would calculate and submit to me his estimate of the percentage of the completion of that building.

354 Q. Do you know whether Mr. Walters, from time to time went to the building himself? A. Yes, he did.

Q. Was this the largest loan of this nature which the Prudence Company ever made? A. The largest one.

Q. I show you Plaintiff's Exhibit 3, Mr. Braislin, and ask you whether you have totalled the without totalling, what the total amount is? A. amounts of those checks or whether you know $3,250,000.

Q. Is Mr. Bigelow still with your company? 355
A. No.

Q. Do you know where these specifications were prepared and how long they had been in the possession of The Prudence Company? A. No, I can not tell you the time.

Q. Do you know whether an application for a loan was made by other people before Mr. Lefcourt, upon these specifications? A. I know there was another application made on this plot—made by a group called The Syndicate Subscription Corporation. Whether he was in that or not, I do not know, and whether those specifications came with that application, I don't know. 356

Q. Were you familiar with your requisition sheets, Mr. Braislin? A. Yes.

Q. I am showing you Plaintiff's Exhibit 33; do you know who prepared the requisition, to show the items of classes of work? A. Do you mean who in our company?

Q. Yes. A. No, I do not. That was a form that we had used for several years.

Q. Will you give me a little more in detail, the mechanics performed by you before you made the first advance under this requisition, Plaintiff's Exhibit 33? A. Is that the first advance made on this? 357

Q. I understand this was the first advance, March 4, 1930? A. I had the requisition of the Central Park Properties, giving their estimate of the amount of work done at that time. I also had a report of our inspector giving me trade by trade—

Q. Just a minute, what inspector, Mr. Braislin? A. The inspector under Mr. Walters, who in-

358 spected this job was a man named Schermerhorn. So that the report I got was a joint report of Mr. Walters and Mr. Schermerhorn. It contained their estimate of the percentage of completion of each trade, which had any substantial amount of work done; also Mr. Walters' estimate of the percentage of the whole job that was completed at that time. I knew the total of the work as estimated. I think it showed on that requisition. I knew our estimate of the cost of that building, and by taking the percentage of that total cost and comparing it with the value of the work, labor and material, as given in that requisition, I formed my
359 opinion as to what the value of the labor and material installed at that time was.

Q. What was your estimate as to the cost of the building? A. Without consulting the figures, I cannot tell you.

Q. Is there anything on that sheet to help you indicate what your estimate was?

The Court: Do you mean the final cost or the cost to date?

Mr. Murray: The total cost of completion.

A. I would rather not hazard a guess on these figures. There are several figures here.

360 Q. Are all these pencil marks yours that are on that exhibit? A. No, those are the pencil marks of a Miss Elton who made some preliminary figuring on this thing. None of my figures are on there.

Q. I call your specific attention to budget items numbers 19 and 20 on that sheet. The No. 19 item is what? A. It says "wooden window frames and sash".

Q. And No. 20 is what? A. Metal window frame and sash. 361

Q. Now, do you know what these specifications provided as to window frames and sash, whether they should be wood or metal? A. I know the fire department would not let them put them in wood, so I assume they specified metal. From my recollection of the specifications, I don't recollect, no.

Q. Did you give any specific directions to the inspector of the engineering department, Mr. Braislin, as to the inspection of this job? A. Do you mean to handle this in any way other than we would any other large building? 362

Q. No, did you give any specific directions as to this job? A. Not that I recall.

Q. Do you know why the affidavit which appears on the top of this Exhibit No. 33 was not executed? A. Just carelessness on the part of the person submitting, I should say.

Q. Did you usually make advances without that affidavit having been executed? A. Oh, I should say that in three-quarters of the loans, people did not fill it out.

Q. You depended upon your inspectors, I presume, to check on the figures which were submitted on the requesition by the borrower, is that right? A. No, I relied on both reports. If there ever was a serious difference in those things, it generally resulted in my talking to the inspector. Of course, I would talk to the borrower, too. 363

By the Court.

Q. But if your inspector's report confirmed the items of the requisition, then you raised no question? A. Exactly.

364 Q. If, however, there was some serious discrepancy, you did raise a question? A. Exactly, sir.

Q. In that case, you would look in the first instance to the furnishing of an affidavit or a certificate by the architect? A. That is so.

By Mr. Murray.

Q. Can you tell by looking at this Plaintiff's Exhibit 33, what percentage of the work installed, an advance was made upon? A. No, I don't think I can. I can calculate what per cent. they show here.

365 Q. But your inspector's report does not appear there, does it? A. This is not our inspector's report.

Q. No. Is there anything in that exhibit to indicate what your inspector's report showed? A. Not that I would want to identify here. I see two figures. I see 16 per cent. and 12½ per cent. Neither of them are my figures and I would rather not identify them. Our inspectors' reports are, of course, on separate sheets.

Q. Is it fair to say that you depended almost exclusively on your inspector's reports in making the advances? A. To my mind, as I think would
366 be the case in anyone's mind, a person probably relies on the report of his own man more than he would rely on somebody else's report, particularly when that other person is trying to get money from him. On the other hand any advancing like this requires the exercising of a person's judgment and if these things agree,—the inspector's report showing the same thing as his report, then you feel pretty certain that that is about the right figure.

Q. Then you never made an independent investigation apart from the inspector's investigation and report? A. You mean by some third party? 367

Q. Yes? A. Simply that the chief inspector, the man in charge, would also make his inspections from time to time, so that there were two of our men.

Q. So that there were two in your organization checking on this job, is that correct? A. There was one regular man on this job, who would visit the job once a week, and the other man would visit the job whenever any question came up, and he would probably visit it at longer intervals anyway, but checking on the jobs as he did, he could not spend as much time as the one whose particular building that was. 368

Q. Would you say that the man who had this particular job in charge spent more than one day on the job? A. In a week?

Q. Yes. A. No, I would not.

The Court: I suppose in the beginning, there was not need of so much inspection. As the work advanced, the amount of the inspection increased, the time of making inspections would increase of course?

The Witness: When that building is in steel, you can almost make the inspection from the street, and count the number of tiers; when the building gets enclosed, then you have to see whether the bathtubs are installed and the light fixtures are installed, and things of that kind, and that of course takes longer. But an inspection would not take, as a rule, as much as a day. It was more like two or three hours. 369

370 Q. Did you ever inspect a job yourself, Mr. Braislin? A. Not during construction.

Q. And what you have just stated as to time which an inspection would take, that is just based upon something that somebody else has told you? A. No, I have inspected jobs, and I also know how many reports a man would turn in to me in a day, and if he spent all day on this building, he couldn't make any other report.

Q. Did the reports of the inspector on this job, Mr. Schermerhorn, come to you? A. After they had gone through Walters' hands.

Q. In other words, the report was first sub-
371 mitted to Mr. Walters and after Mr. Walters digested it, he passed it along to you? A. Exactly.

Q. Did Mr. Walters initial or mark on the report that he had examined it? A. As a rule, he would give me his estimate on the percentage of completion of the entire building, and would initial it.

Q. Maybe we misunderstand each other, Mr. Braislin. Are you talking about the report upon which an advance was based? A. No, I am only talking about one kind of inspection report and that is a sheet which divided into columns. One of them is in evidence there, a blue sheet, and it
372 gives the estimate of the inspector of the percentage of completion of each trade, and then the estimate of the completion of the entire job.

Q. Then we did misunderstand each other, because I was talking of the ordinary report which the inspector would make.

The Court: You mean the daily report?

Q. The daily report. I understood you to say, Mr. Braislin that you knew or that you had an

idea how long it would take to make an inspection, 373
that is, a daily inspection, because the reports came to you? A. That is his report.

Q. Did he submit a report which came to you after every visit made by him? A. No, but every visit that a man made to the building, he would fill out a column on one of these sheets. That constituted his report; that is the percentages of the various trades. He did not render a report which he wrote out in spelling; but he had been on the job and found this, that and the other thing done; that was our method of reporting.

Q. So that if an advance was made by you once a month, and an inspector had made reports once 374
a week, you would not see the four reports, would you? A. Yes, I would see the whole four reports,—I would see them when I made that inspection, but each report would not come to me and be examined by me every time it was made. I would see them all ultimately, yes.

Q. You would see them altogether, and not separately, is that right? A. Exactly.

Q. Now, there is a letter which has been offered in evidence—I show you Plaintiff's Exhibit 12, in which Mr. Walters has written to say that the "samples of face and court brick have been approved"; do you claim that the brick that was 375
approved is not the brick which went into this building, Mr. Braislin? A. I don't think so.

By the Court.

Q. What do you mean? You do not claim it or you don't think the fact is so? A. I think the brick that was approved was brick that went into the building.

Mr. Murray: I call your Honor's attention to Schedule B-15.

376 Mr. Schenck: I have stated to Mr. Murray that that claim of that particular item was being withdrawn.

By Mr. Murray.

Q. Who is Mr. Fox? A. Frank Fox is that?

Q. Yes. A. He is a vice-president of The Prudence Company, also president of Realty Associates.

Q. Where is his office? A. 162 Remsen Street, Brooklyn.

Q. That is where your office is? A. Not now. It was while this loan was being advanced.

377 Q. Was that your office in February of 1932? A. Yes.

Q. Do you know if Frank Fox had anything to do with this loan or the construction work? A. Not actually, no.

Q. Do you know why it was that Frank Fox was the one who verified the claim, and not yourself or someone familiar with the case? A. No.

Q. You were familiar with the matter, were you not, at the time, in February, 1932? A. Yes.

Mr. Murray: Will you give me Exhibit 13, please?

378 (Document handed to counsel.)

The Court: If you are going to withdraw any of these items, I think they should be submitted to him. Let Mr. Murray have them, if possible, before tomorrow morning.

Mr. Schenck: Yes, we will give them to him tonight. I do not want to preclude Mr. Murray from cross examining him and bringing out any discrepancies that he sees fit to go into, but after all, Mr. Braislin did not prepare the original schedules. The revised

schedules have been prepared after a very careful check and investigation; it has been an enormous job. 379

The Court: Yes. I am sure that in this case Mr. Murray has not succeeded in attacking the credibility of this witness at all. I may say that I have been very favorably impressed by this witness. He has answered questions put to him frankly and there is no sense in going far afield and I suppose that is not Mr. Murray's intention at all.

The Court: I think you better let Mr. Murray have your revised schedules and we will suspend now until tomorrow until ten-thirty. 380

Mr. Schenck: If your Honor please, following the program indicated last night, we have given to Mr. Murray these revised Schedule A and Schedule B. They are somewhat below, in amount, the totals of the other schedules; that is, so far as incompletion items are concerned, and items of departure. These revisions consist in a reduction of our claim, rather than an increase of our claim.

Mr. Murray was good enough to say that he would go over these items, and make a specific denial in regard to them, or if there were any that he could eliminate from our case by either not denying or admitting it would, I think, limit the length of the trial of the case. 381

Mr. Murray: I think I can in many instances, after our investigation, say that we can not dispute the reasonableness of the charge made against The Prudence Company.

The Court: All right.

382 Mr. Schenck: Then, if I may, for the purpose of definiteness, ask that Schedule A be marked for identification and Schedule B also be marked for identification—

The Court: Yes.

(Marked respectively Plaintiff's Exhibits 84 for Identification and 85 for Identification.)

Mr. Judd: We have included in Schedule A all payments made by The Prudence Company in completion of the building, not only those which were in Schedule A before, but
383 those which were in paragraph 37 of the complaint, such as insurance, taxes, and supervision fee; so that all the payments will be in a single list, and I think that will be more convenient.

The Court: Yes.

Mr. Judd: That means that there are just three separate items to be considered: Schedule A of payments; Schedule B of omissions, and the item of lost interest, which was testified to by Mr. Braislin yesterday.

The Court: All right.

384 ———

GORDON S. BRAISLIN resumed the stand.

Cross examination (continued) by Mr. Murray.

Q. Were you able to ascertain more definitely, Mr. Braislin, the date when Mr. Walters left the company? A. No; I did not know you wanted it more definitely than I had it. I could telephone this morning and get it.

Q. Will you find out by tomorrow morning, Mr. Braislin, and that will be all right? A. All right. I will be glad to do that, sir. 385

Q. Is Mr. Billsborrow still employed by the company? A. Yes, he is.

Q. Now, as respects the operations carried on at this building, was Mr. Walters and his assistants—were they the people who were familiar with the details thereof? A. Yes.

Q. Did you from time to time acquaint yourself with the details of the work? A. Only as those things came up in our committee meetings, with respect to the plans or specifications, and applications for changes. 386

Q. Was there any rule in force in the inspection and engineering department that the department should familiarize itself with plans and specifications filed for the granting of a loan? A. I want to make sure that I understand: Do you mean after the loan was granted, or after the letter of acceptance was signed?

Q. Yes. A. Yes, plans and specifications would then be sent to the inspection department, and in a general way, at least, they would go over them, yes.

Q. Was there any rule which you, as head of that department, had put into effect regarding that matter? A. No; I did not know of any rule. They were, of course, expected to do whatever they could. We wanted to see as good a building put up, in any case, as we could get. 387

Q. What check, if any, was made by the company, as to whether or not the borrower was complying with the provisions of the building loan agreement? A. Our only check was these inspectors. Of course, they handled a good many build-

388 ings. We had, at one time, I think, as many as oh, one hundred and twenty building loan operations going on at once.

Q. How many inspectors did you have? A. We had, I think, four—five at one time.

Q. Did you know Mr. Schermerhorn? A. Yes.

Q. What qualifications did he have? A. He had been with the company for oh, I guess, eight or nine years, and had been in a similar job all that time. Beyond that, I do not know what he had done before that time.

Q. But during his eight or nine years with the company, his duties were to inspect buildings, is
389 that right? A. Yes.

Q. Was there any other inspector at any time during the course of this work who inspected this particular job, other than Mr. Schermerhorn? A. Aside from Mr. Walters and Mr. Billsborrow, not that I know of.

Q. Are you familiar, Mr. Braislin, with whether or not on these particular specifications, which were the specifications filed with you originally, the contemplated building could be erected, or whether it would have been necessary to draw more detailed specifications? A. No, I could not answer that.

390 Q. Do you know that as a matter of fact there is not included, in these particular specifications, specifications which were subsequently prepared for the contractors who did different types of work, such as heating and plumbing? A. No. You see, my total contact with those specifications was when those applications for changes came before our committee, and all the results of those were put in writing, and I think are for the main part in those letters that are now in evidence.

Mr. Murray: I might say at this time, your Honor, that if I knew that Mr. Walters or some other gentleman from the Inspection Department was going to testify I would reserve a lot of questions which I might otherwise ask Mr. Braislin. Yet I do not want to bind the plaintiff in any way to guarantee that they are going to produce Mr. Walters. 391

The Court: What is your position with respect to that?

Mr. Schenck: Our position is that we intend, after Mr. Braislin, to put Mr. Grad, the architect on the stand. We should then put Mr. Lukach, of Bing & Bing, who made the inspection and superintended the completion, on the stand. We shall then put Mr. Zilber on the stand, who will estimate the value of the departures from plans and specifications. Beyond that our plans are a little indefinite, but I think I shall very probably put Mr. Schermerhorn upon the stand; I have not decided that yet. But I do not at the present time, as a part of our affirmative case, intend to put Mr. Walters on the stand. 392

Mr. Murray: You understand I do not insist that you do it at all, Mr. Schenck.

Mr. Schenck: That is perfectly all right. We have nothing in the way of surprise, and I think I can say if the production and giving of testimony through Mr. Schermerhorn would give Mr. Murray the opportunity that he desires to go into the details of how inspections were made and all that, we should put Mr. Schermerhorn on the stand. 393

The Court: Was Mr. Schermerhorn in touch with the specifications from the time that they were submitted to you?

394 The Witness: He was, yes.

The Court: Then that would cover it.

Mr. Murray: As long as anybody is going on the stand who is familiar with the specifications, I shall not bother to go into the details with Mr. Braislin.

Mr. Schenck: The extent of Mr. Schermerhorn's acquaintance with the specifications in his inspection I would prefer be left to proof. My understanding of that situation is a little bit different from a detailed knowledge of plans and specifications. I am perfectly willing to state it, but I am not advancing it ar-
395 gumentatively.

The Witness: Well, that is true; he was not on this committee.

Mr. Schenck: My purpose as to this inspection is to show that it advised the company of the general stage of the work. My understanding of it is that the inspection was not to check up as to whether the borrower was conforming to plans and specifications, that that was not feasible; that the work with regard to the plans and specifications would be covered up from one day to another, and that the
396 only purpose of the inspection was the general stage of the job so far as progression and justification for making an advance of the loan. That is my understanding of the matter.

I do not want any misunderstanding of it, but if Mr. Schermerhorn is placed upon the stand by us and if on cross examination by Mr. Murray he does not show what Mr. Murray desires in the way of knowledge of plans and specifications, I do not want to have Mr. Murray say that he would have preferred to

have continued his cross examination of Mr. Braislin. 397

Q. Mr. Walters did practically all the communicating with the borrower while he was with the company, as regards materials and such like going into the building; isn't that so, Mr. Braislin? A. Yes.

Q. I show you Plaintiff's Exhibit No. 17, which is a letter from Mr. Haas to the Prudence Company, attention of Mr. Walters, assuming to confirm a conversation had at a conference attended by Mr. Walters, and in which he enclosed two folders of pottery showing the various fixtures 398 proposed to be put in the building, and ask whether that was the usual manner of corresponding between the two companies (handing witness)?

Mr. Schenck: I do not think that the question is quite fair. We have had on this particular subject of waiver placed in evidence all of the correspondence that I know of, and now for him to give Mr. Braislin one instance and ask if it characterized the mass I think is not quite proper cross examination.

The Court: The witness knows what to say about that. 399

A. To tell you the truth, I am at a little loss to know what to say. I would not say that was usual. I would say in this instance that rather than relying on specifications the Central Park Properties had decided simply to refer to some particular type of fixtures shown in a booklet, and might be referring to a design as well as quality, and for that reason did it that way.

400 Q. As a matter of fact don't you know, Mr. Braislin, enough about this job to know that in most instances there is nothing in the original specifications as regards the particular type of material to be installed, other than probably that it was to be of first quality, good quality? A. No, I am hardly in a position to testify about that, because, as I say, my contact with this thing was on this committee, and we decided their applications for changes which were explained to us, and we decided them there. I suppose I would have a hard time even remembering those.

401 Q. If the Central Park Properties went to the trouble of presenting to The Prudence Company samples of the actual material which was going into the building, didn't they comply with more than the specifications? A. Well, I do not know just what you mean by that.

Q. I mean this: assume that it will appear here that so far as the original specifications are concerned the Central Park Properties could have used in numerous instances any one of numerous types of material. Assume that. And then assume that the Central Park Properties in instance after instance takes up with The Prudence Com-

402 pany the particular type of material which it has in mind for the installation into this building. Would you say they were endeavoring to do what they could with you to put up a proper building? A. I would say that if the Central Park Properties submitted an exact sample of something that they were going to put in the building, then they were extending every courtesy to us in that particular respect.

Q. Then as I understand it you do not claim the Prudence Company had any right to require

Central Park Properties to submit to The Prudence Company the different types of material which were going into the job? A. If those materials complied with the specifications that we had accepted, then if they comply with those I would say they were doing everything that they needed to do. 403

Q. If you discovered during the course of the job that there were materials being installed therein which did not come up to your ideas of the building contemplated, you would have refused to advance at certain times, would you, unless the material was changed? A. We would certainly have made our complaint about it, yes. 404

Q. And Central Park Properties was entirely dependent upon your determination, whether you would pay an advance and in what amount, at any time? A. I do not think that is quite a fair way of putting it, because any party to a contract of course is dependent upon the other party carrying out the terms of the contract. I mean we have to live up to something if we advance them money, certainly. On the other hand, we have to depend on Central Park Properties carrying out what they are supposed to do also.

The Court: Aren't you going really into the function of the Court, after the facts are in? This is really a supposititious and hypothetical examination, the last few questions. 405

Mr. Murray: Of course, Mr. Braislin had charge of these advances, your Honor, and claims have been made here regarding the interpretation of the building loan agreement which are not in conformity with my ideas.

406 The Court: After all, it is not the interpretation of the parties which will govern here, is it?

Mr. Murray: It might.

Q. You at no time, Mr. Braislin, informed the Central Park Properties that Mr. Walters had no authority to pass upon questions which might be brought up by the Central Park Properties, did you?

Mr. Schenck: I object to this on the ground that the rights and obligations in the matter are specific in the contract—that any waiver
407. must be in writing, by an officer of the company, and that whether or not Mr. Walters was informed of this or that has nothing to do with the case. It is entirely immaterial.

The Court: I overrule the objection.

Mr. Schenck: Your Honor will grant me an exception.

The Court: Yes.

A. I think that we informed the Central Park Properties of the existence of the committee which passed on any changes in specifications or plans. I know that it was referred to in letters, I think
408 by both ourselves and Central Park Properties, and I know there were specific written waivers or acceptances or modifications referred to that committee. I think that was understood all around.

Q. But if there were any such cases, Mr. Braislin, where the committee passed upon changes, you did not write to the Central Park Properties, did you? A. No, that is true. Mr. Walters did that.

Q. Mr. Walters wrote to the Central Park Properties? A. That is correct. 409

Q. So far as the Central Park Properties knew, if Mr. Walters did approve this, that or the other thing without making any mention of the committee having passed upon them, is there anything which you wrote to the Central Park Properties giving them notice that they would have no right to rely upon that approval of Mr. Walters? A. I believe the contract itself says that waivers will be in writing, and I believe that the Central Park Properties in at least a few instances requested waivers in writing for that reason. I think that, too, was known by both parties. 410

Q. Will you search and find any correspondence from the Central Park Properties in which they ask for a specific written approval of a change? A. I think there are confirmations asked for in these letters that are introduced in evidence.

Q. Have you in mind that there were any other such letters than the ones which have been offered in evidence already? A. I do not know of any others.

Q. When you made that statement that you had knowledge of certain instances where the Central Park Properties did certain things in that respect, were you referring to the exhibits already in evidence? A. Exactly. 411

Q. And you were not referring to any other papers? A. No, at that time I was referring to these exhibits in evidence.

Q. Who had the power in The Prudence Company to approve the type and quality of fixtures to be installed in the building? A. This committee that I have referred to.

412 Q. Did Mr. Walters have the power to approve fixtures without first taking it up with any committee? A. No.

Q. And that is so even though the approval of the fixtures would not constitute any change in the plans and specifications? A. That gets a little difficult there, again, because if something is in accordance with the plans and specifications it would have been approved; I do not see how anybody would have the right to disapprove it.

Q. Do you know whether the committee did as a fact approve the materials mentioned in that Exhibit No. 19 (handing witness)? A. These
413 bathroom fixtures, they came up before the committee, yes.

Q. Do you know whether the hardware which went into the building was approved? A. I know that there were samples of hardware which were submitted to the committee, and if they went into the building I assume they were, yes.

Q. Who would determine whether or not the hardware which was approved went into the building? A. Well, our representatives there were the inspectors, of course, and we depend—if the Central Park Properties submits to us samples of hardware and says, "This is what we are going
414 to put in", and we approve those samples, we don't expect them to sneak some other samples in, of course; we expect them to live up to what they agreed to do.

Q. But you expected your inspectors to check to see that that material went in, did you not? A. In so far as they were able, of course, yes.

Q. Now, in Schedule B of the complaint, Item 11, you made a claim for $29,500, the claimed difference between the value of hardware actually

installed, and the amounts the specifications called for as hardware expense. Now, at the time that complaint was drawn, did you know as matter of fact whether the hardware which was going into the building had been approved? A. I don't know. I did not prepare those schedules. In fact, I do not think I personally knew that claim was being made about the hardware. 415

Q. Well, were you not the one man who was familiar with this job? A. No. After this building loan—the advances had been completed, then my contact with this job ended for about two years, until about a year ago I picked up the management of the building; but I had nothing to do with the completing of the building. 416

Q. Well, you had to do with the making of all advances, did you not, Mr. Braislin? A. Yes.

Q. And when did your contact with this job stop? A. After the advances were completed.

Q. After the advances were completed? A. Yes.

Q. But was there anyone else in the organization, The Prudence Company, more qualified than you to say whether or not, when they were preparing a claim, in the matter of hardware Central Park Properties had or had not complied with their contract? A. Of course. 417

Q. Who? A. Mr. Lukach, for instance, who examined this building in great detail, superintended the completion of it, who obviously knew by comparing the specifications and plans, exactly what was there, and after weeks of examination would know exactly what was missing.

Q. Was he with The Prudence Company at the time the building was being erected? A. No. He is not with The Prudence Company now. He is

418 with Bing & Bing. They completed this structure.

Q. So that Mr. Lukach prepared the claims based upon a reading of the specifications, is that right, and examination of the building? A. Together with any waivers.

Q. Do you know that this item or this claim for difference in value of hardware has been withdrawn now? A. Of course I do.

Q. And if the matter had been taken up with you, would you not have been able to give information which would have been of assistance on the matter? A. Well, I don't know. You see, there are a great many jobs, and if I had made a
419 study of it, possibly I could. I know the reason this was withdrawn last night was that I went over this item, and found out that the samples had been submitted. I think that we all agreed we did not want to make a claim that we thought should not be made; and no claim has been made that we do not think should be made.

Q. Those papers were in The Prudence files all this time, were they not? A. I assume so.

Q. And in whose possession? A. I don't know.

Q. Was there any particular file in which papers concerning this job might be found? A. There is a file on this property, yes, but these
420 papers would not be there. These papers would probably be in the possession of the lawyers.

Q. Did you keep a file on this job? A. I personaliy?

Q. Yes. A. No.

Q. Did the engineering and inspection department keep a file? A. Only in so far as their own inspection reports are concerned.

Q. Is it your recollection now that the hardware had been approved? A. My recollection is

that samples of hardware were submitted and were approved. 421

Q. And it was decided that what went into the building was in accordance with the samples, is that right? A. As far as I know.

Q. In Exhibit No. 27, dated April 10, Mr. Walters wrote to the Central Park Properties approving the following materials and equipment: Copper radiators, Electrolux gas ranges, Copperior copper-bearing sheet-steel, hardware, Speakman brass fittings. I call your specific attention to the item of Electrolux gas ranges. That is presumably a mistake, is it not, Mr. Braislin, because there were no gas ranges inserted in the 422 building? A. It may refer to gas refrigerators.

Q. Exactly. Electrolux gas refrigerators. And there is no question about that in your mind, is there? A. I don't think so. I am not—I can not testify much as to these individual items. I mean I can not remember all these separate things very much.

Q. Electrolux gas refrigerators were put into the building, were they not? A. There, again, I will not swear to it, though I believe so.

Mr. Schenck: It is a small matter, but in reading Plaintiff's Exhibit No. 27, Mr. 423 Murray said that Mr. Walters had approved. The expression is "we had approved". I do not want any improper or inaccurate recitals to go on the record.

Mr. Murray: All right.

Q. Now, I will call your recollection to a talk which you had with a Mr. Race in November. A. Yes.

Q. 1930. A. Yes.

424 Q. When you testified yesterday, you said "I told him exactly what our reports had shown". Now, what do you mean by that? Did you tell him the percentage of completion? A. I told him then, with that report before me, whatever percentage we showed in any trade; whatever the report I had before me did show. I do not recollect now whether he asked about any special trades, but if he did, I told him just what we had.

Q. I show you now Plaintiff's Exhibit No. 45 for Identification, and ask you whether that is the report which you had before you at the time you spoke to Mr. Race (handing witness)? A. I am
425 inclined to think no. I am inclined to think that I had the report showing the percentages of the various trades—because that is more complete than this one.

Q. Is this what you mean by a percentage of the different trades, Mr. Braislin (exhibiting paper to the witness)? A. Yes.

Q. Is there any date on that? A. Yes; "11/20". That is November 20 is the first one. There were sheets before this one. This is only a part of it. There was a sheet corresponding to this date, I think.

Q. Would it be your recollection, then, that this,
426 being Plaintiff's Exhibit No. 50, for Identification, is the report which you had before you at the time you spoke with Mr. Race? A. A report similar to that, but it was a report for an earlier week.

Q. Do you remember telling Mr. Race then the building then was 99 per cent. completed? A. No, I don't remember that. I don't think I—I think I told him exactly each trade,—whatever the report we had showed, in its percentage of completion.

Q. Do you know whether any computation was ever made by you or for you to show at any particular time the percentage completed of all the work? A. Yes, each week, I think—I don't know whether it is on that report, but on these other reports Mr. Billsborrow or Mr. Walters would compute and initial their estimates of the completion of the entire job. Of course these things are the estimates of the inspectors and Mr. Walters and Mr. Billsborrow. It is a calculation that they make mentally on the job, and they give their opinion. That is all it is. 427

Q. So in addition to percentage estimates of each individual item, there would be one percentage estimate of all the items together, is that correct? A. Yes, all of them being estimates of the men. We never made any representation that they were anything else. 428

Mr. Murray: I now offer in evidence, your Honor, Plaintiff's Exhibits for Identification Nos. 45, 46, 47, 48, 49, 50, and 63, 64 and 65.

The Clerk: Shall I mark them, your Honor?

The Court: They may be received. They can be received as one exhibit. They are all the same kind of papers, are they not? 429

Mr. Murray: These are the reports.

The Court: The periodical reports of the inspectors?

Mr. Murray: Yes.

The Clerk: They are already marked for identification with various numbers, and we can strike off the "identification".

The Court: But they are received as defendants' exhibits.

430 The Clerk: Then, they will be Defendants' Exhibit B.

(Marked collectively Defendants' Exhibit B.)

Q. Now, on December 5, Mr. Braislin—December 5, 1930, was a final payment to Central Park Properties. Was that payment made by you? A. It was made by me on the advice of Mr. Mark, our general counsel.

Q. Now, prior to the date of making that final advance, you and representatives of the Central Park Properties had discussions, did you not, as
431 to how much there should be retained from the final advance? A. I think those discussions were all held with Mr. Mark. I had discussions with the Central Park Properties people, of course, all the way through this loan, and particularly toward the end, because we were receiving constant demands from them for the final payment, and from the time that I got that first demand, I referred this matter to Mr. Mark for his advice, and he told me—

Q. Never mind that, Mr. Braislin. A. All right.

Q. When demands were made upon you for the
432 final advance, did you tell them that the building was not entirely completed and, therefore, you would not give them the final advance? A. Well, it is a little hard for me to recollect what language I used. I do know that we negotiated, if I may put it that way, to advance as small an amount of money at that time as we could, yes.

Q. If, of course, the building had been entirely completed, you would have had no hesitancy in making the final advance, is that right? A. If it

was completed in accordance with the building loan agreement, I do not see any reason for hesitating, no. 433

Q. And it was a very material question at that time in your mind how much work remained to be done to complete the building, in accordance with the plans and specifications, was it not? A. Well, that is material with a lot of other things that are material—such as the certificate of occupancy, which the Central Park Properties was using as the basis of their final advance requests.

Q. Well, you did not comply with that request when it was made? A. Do you mean by that advance all the money as soon as the certificate of occupancy was issued? 434

Q. Yes. A. Well, obviously not. The records speak for that.

Q. Yes. Then, whether you should make a final advance would be determinable or dependent upon whether the building was completed in accordance with the plans and specifications? A. That I will not agree with. Whether I made the final advance at that time, at that point, depended upon whether Mr. Mark told me to or not, because this got into a question of law, that I was not going to decide.

Q. Well, before the matter ever got into Mr. Mark's hands, is it not the fact, Mr. Braislin, that you, based upon reports and inspections which had been made, decided that they were not entitled to the full amount at that time? A. I do not think that is quite a fair way of asking me—asking it of me. I will put it this way: prior to the issuance of the certificate of occupancy, I calculated the advances, and advanced the money; and when the demand for a final advance came in to 435

436 me, then it was that I consulted Mr. Mark. Now, from then on I acted on his advice.

Q. Well, after the certificate of occupancy was issued, you made further advances from time to time, did you not? A. Yes.

Q. Upon what basis did you act in making those advances? A. It was a question largely of negotiation with the Central Park Properties, and coming together at as low a figure as we could.

Q. Well, during those times were you taking into consideration the status of the building, the status of the work at these times? A. I was taking into consideration everything that I knew, of
437 course; and I was taking into consideration also the fact that Mr. Mark had instructed me to advance the money in that way—in as small amounts as I could get an agreement to.

Q. And in endeavoring to find what that amount would be, did you not discuss the question of what work remained undone? A. I think, undoubtedly.

Q. And did you prior to December 5, make special efforts by means of inspections, to determine just what the exact status of that building was, so far as completion was concerned? A. I think we were being as careful as we could, yes.

438 Q. Now, Plaintiff's Exhibit No. 76, this certificate, which was executed by The Prudence Company, made provision in there for what is called the depositing with Prudence Company of $75,000 until all the work of completing the building on the premises, except the final coat of paint had been completed to the satisfaction of The Prudence Company (handing witness). Do you know why there was the specific mention of paint—painting in there—the final cost of painting? A.

May I just glance through this, because I have not read it lately? 439

The Court: Yes.

The Witness (after examining paper): Yes. I think that paint was separated from other items of completion because, as was brought out here earlier in this case, some of the painting you would have to wait quite a little while for; especially the final coat. Special tenants would want special colors in finishing their apartments.

Q. And after reading that, does it not refresh your recollection that $25,000 of that $75,000 was allocated to the cost of completing the painting? 440 A. Certainly allocated out of this $75,000. As to whether that was supposed to be the item of the cost of completion of the painting, I do not know.

Q. Well, the company had before it at that time Mr. Billsborrow's reports, did it not? A. Yes, Mr. Mark had them.

Q. And at or about this time had not Mr. Billsborrow made a report that the cost of finally completing would be about $43,000, inclusive of the paint? A. I believe he had; that is, that that was his estimate. 441

Q. And you depended upon Mr. Billsborrow, who was keeping you advised as to the condition? A. Well, I have answered that, I think, yesterday. In all these advances and in considering all these things I and, I think, Mr. Mark took into account those reports, the requests of Central Park Properties, and the building loan agreement. These things had to be an exercise of judgment, of course.

442 Q. Mr. Mark was vice-president? A. And general counsel.

Q. Now, is it not your recollection, Mr. Braislin, that for, oh, say, two weeks prior to December 5, a detailed investigation and inspection of this building was made? A. We asked Mr. Billsborrow, in addition to making his usual percentage reports, to also make out a written report—which are those which we have put in evidence—which would be a little more readable for Mr. Mark, for instance, than a percentage report.

Q. Will you look at those papers, which are now marked Defendants' Exhibit B, and see if you
443 can find there the particular report which you have in mind now, which Mr. Billsborrow made just before December 5 (handing witness)?

(Informal discussion, off the record, between Mr. Murray and the witness.)

The Witness: I think that is it (handing paper to Mr. Murray). I think that is all part of the same.

Q. Now, on November 28, 1930, Mr. Billsborrow made to you, Mr. Braislin, a report. Would you say it was because of this report that $75,000 was retained from the final advance? A. It certainly
444 had an important part in it, yes.

Q. When did The Prudence Company learn that Central Park Properties had left this job? A. Well, the leaving of that job was a rather gradual process. It did not take place on any one day. For instance, that report, the last part of December, showed that there were still some men working there—maybe only a few men working on one or two trades. I should say that there was a withdrawal of men over a period of a couple of weeks,

beginning about the last week of December or the last two weeks. 445

Q. Under what circumstances did this gentleman from the appraisal department go to this property late in December? A. I don't know whether I asked him to go or someone else, but simply to keep as close a check on this thing as we could, because we too were wondering what was going to happen to the job.

Q. Did he make any report to show when finally there were no workmen on the job? A. No further reports other than those that are in evidence, that I know of.

Q. In Mr. Weller's report, Plaintiff's Exhibit No. 53, for the week ending December 27th he states that seven daily inspections were made by him. That would, then, be for the seven days before December 27th, would it not? A. I judge so; yes, sir. 446

Q. And he states that one day and one night watchmen have been on the premises continually, and that these men he understands are in the employ of The Prudence Company. Do you know whether that was the fact, that he has his information correct? A. It probably is. It must be. I do not know the exact date, but I know we did put on a night watchman and a day watchman, or continued the employment of those, I do not know which it was. 447

Q. Was there any arrangement at that time between you and the Central Park Properties for you to take possession of the building? A. There was an arrangement about possession. I think it was around the 7th or 8th of January. There is a letter in evidence that refers to an agreement

448 like that. It is the one you asked whether we had yesterday. That is the agreement I refer to.

Q. That is a specific agreement that was mentioned in a letter—a specific written agreement? A. That was about the first week or ten days of January.

Q. Prior to that was there any oral arrangement between Central Park Properties and The Prudence Company that The Prudence Company should take possession? A. Well, not that was made with me. Whether Mr. Mark and Mr. Haas or somebody had an arrangement like that orally I do not know.

449 Q. Did you find a specific agreement regarding the occupancy? A. No.

Q. Did you look? A. I have not. I will make a note of that.

Q. Would you be good enough to make a search, Mr. Braislin? A. Yes.

Q. I show you Plaintiff's Exhibit No. 56, which is a letter dated January 7, 1931 (handing witness), from Mr. Race to you, referring to an earlier conversation in November, I believe. A. Yes.

Q. Did you communicate with him by telephone
450 or otherwise in answer to this letter? A. I do not recollect that I did.

Q. Do you know at that time, January 7th, that the Central Park Properties Company was off this job? A. I knew through those reports, as to the number of men working and so forth. That letter, incidentally—oh, before that was replied to, four or five days after it, a conditional bill of sale was filed against the premises by Otis Elevator Company, and we have immediate notice of that, of course. I think that is the only notice at that time,

in writing at least, that was given. As to the tele- 451
phone conversation, I don't remember.

Q. The next communication which you had with the Fidelity and Deposit Company of Maryland after Mr. Race's letter of January 7th was Plaintiff's Exhibit No. 57, dated January 13th? A. Yes.

Q. In which you mention the fact that a conditional bill of sale of Otis Elevator Company had been filed. A. Yes.

Q. Either at that time or any other time prior to that did you inform the Fidelity and Deposit Company that the Central Park Properties were off this job or that the work had not been com- 452
pleted?

Mr. Schenck: I think that that is a notification, and a matter of argument.

The Court: That is a matter of argument. I mean other than through this notice. You may answer that.

A. May I have the question?

Q. (Read by stenographer.) A. I don't recollect any notice to the effect that the men were off the job at that time. As soon as we knew that the work was incomplete to the extent that it was, we 453
notified— As to giving notice, I simply wanted to state that as soon as our company did learn of the exact completion of this job and the amount of work still to be done notice was given to the surety company immediately; the next day, I think.

Q. I show you Plaintiff's Exhibit No. 62 (handing witness), dated February 25th, and ask you whether or not that is an exact copy of one of Mr. Billsborrow's reports? A. I can answer it to this extent. Of course we knew pretty well at this

454 time that the reports that we had had from Mr. Billsborrow were pretty—underestimated the amount of work to be done still quite a good deal. At this time we did not know exactly how much. But I know that because I had that doubt and did not know how much of this still had to be done I made these pretty general at this time, until I had a more exact report by somebody who would make a very thorough and probably long examination of the building.

Q. When did you begin to doubt Mr. Billsborrow's reports? A. On Lincoln's Birthday of that year Mr. Guthman and Mr. Greve, Mr. Waterman
455 and Mr. Pender I believe went over to this building, went through it, and they discovered at that time there was a great deal more work to be done than Mr. Billsborrow's report showed; and it was the day after that that the letter of the surety company was drafted, and I think sent the 14th of February.

Q. In that earlier letter no mention was made of any specific items? A. No, that was just the first notice we had, and we sent that notice right away.

Q. Mr. Billsborrow was not with these gentlemen whom you have mentioned? A. No, I think
456 not.

Q. On that inspection? A. No.

Q. But you retained Mr. Billsborrow in your employ after that time? A. Yes.

Q. Do you know how long the inspection of these gentlemen lasted on that day? A. No, although it took a good part of the day. I know they spent quite considerable time there.

Q. What was the next step taken by the Prudence Company as regards an inspection of this

building after the examination by the gentlemen whom you mentioned a moment ago? A. My recollection is that we took steps immediately to determine exactly the amount of work that still had to be done, and decided to have Bing & Bing make that examination. I believe that notice was given to the surety company that that examination would be made, and invitation extended for them to have their own representative there to go over the work with Bing & Bing's men. I think that following that report demand was made that it be finished, and that that was not done I think we went ahead ourselves. 457

Q. Do I understand that you kept in contact with the work up there from that time on? A. Did I? No, I did not. 458

Q. Were all reports made to you by Bing & Bing's men respecting the work to be done? A. No.

Q. The reason I ask that is that it was you, Mr. Braislin, who in subsequent letters informed the defendants of what you claimed. A. That is right. Of course, all those letters are corporate letters. I signed as an officer of the company.

Q. You have stated here, Mr. Braislin, if I am not mistaken, that the building was not completed until October 1, 1931. A. That is an approximate date. 459

Q. Is that based upon information received by you from other people or is that based upon your own personal knowledge? A. No, that is based largely on information received from other people. I think Mr. Lukach can give exact and first hand testimony on that.

Mr. Murray: I offer in evidence a letter dated November 6, 1930, from The Prudence

460 Company, R. E. Billsborrow, to Central Park Properties.

(Marked Defendants' Exhibit C.)

Mr. Murray: I offer in evidence a letter dated November 7, 1930, from Central Park Properties to Prudence Company.

(Marked Defendants' Exhibit D.)

Mr. Murray: I offer in evidence letter dated November 13, 1930, from Central Park Properties to Mr. Mark.

(Marked Defendants' Exhibit E.)

461 Mr. Murray: I offer in evidence a letter dated April 10, 1930, from Central Park Properties to Prudence Company.

The Court: Mr. Murray, if these exhibits that you are now offering are not necessary to the cross examination of this witness, then they should properly be reserved for your case. They may be received. We will not undo what we have now done, but I am only suggesting it as to other exhibits you may have in mind.

Mr. Murray: That is perfectly all right,
462 your Honor. Except as to this particular last letter I would like to question the witness.

(Marked Defendants' Exhibit F.)

Q. I show you a letter dated April 10, 1930, from Central Park Properties to Prudence Company (handing witness). In your investigation is there anything to doubt that such a letter was delivered to The Prudence Company, Mr. Braislin? A. No, I have no reason to doubt it. I would not

have received it, and I thought we had a complete file of the letters we had received; but it is entirely possible one might not be there. 463

Q. I show you a specification or instrument stating, "Specification for heating and ventilating" (handing witness), and ask you whether that is a copy of the specification mentioned in Exhibit F? A. I would not know. I would not know whether it had or not.

The Court: That may be marked for identification.

(Marked Defendants' Exhibit G, for Identification.) 464

Redirect examination by Mr. Schenck.

Q. Mr. Braislin, you stated in answer to a question asked you yesterday by Mr. Murray that you knew how long these different inspections would take from the number of reports that one inspector would hand in to you per day. A. Yes.

Q. Can you tell us merely from the practice approximately how many such reports there would be? A. Well, of the larger jobs probably three in a day; if the jobs were not so very large, maybe four.

Q. I show you Plaintiff's Exhibit No. 84, for Identification, constituting Schedule A, payments made by The Prudence Company in completing the building, and I also show you Plaintiff's Exhibit No. 85 for Identification, the schedule of the claimed departures and variances from the specifications (handing witness), and ask you whether or not when you made the final advance of the loan you knew of those items on those two schedules? A. No, I did not. 465

466 Q. I ask you whether or not when you received from Mr. Billsborrow his additional reports in the latter part of February you knew of those items? A. No.

FRANK GRAD, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Schenck.

Q. What is your business, Mr. Grad? A. Architect.

467 Q. Where is your office? A. Newark, New Jersey.

Q. In September, 1929, what was your business? A. Architect.

Q. And where was your office at that time? A. Both in Newark and in New York.

Q. Tell us very generally your experience as an architect—very generally. A. I am practising twenty-eight years now, and I have designed many of the large structures of every type and description.

Q. Business buildings? A. Yes, sir.

Q. Office buildings? A. Office buildings, hotels,

468 theatres.

Q. You have done considerable work for the City of Newark? A. I did, sir.

Q. During the last few years approximately what per cent. of its entire architectural work have you done? A. About twenty-five or thirty million dollars. Over that.

Q. There is a certain Lefcourt Building in Newark that you designed? A. Yes, sir.

Q. What is the name of that? A. It is the Lefcourt-Newark Building.

Q. And you drew the plans, prepared the specifications, and also superintended the construction of that building, did you? A. I did, sir. 469

Q. You drew the plans and prepared the specifications of this building which we are now calling the Essex House? A. Yes, sir.

Q. I show you this roll of plans which have been marked Plaintiff's Exhibit No. 5, and ask you if those are the plans—you need not unroll them unless it is necessary—whether those were the plans which you drew for the Essex House? A. They are, sir.

Q. And those were the plans submitted as the basis of the building loan? A. Well, I would 470 prefer to look at those, because there were so many changes and I want to see whether it was the Syndicate Subscription.

Q. Yes. I call your attention to the stamp on the outside if that would be of any assistance to you (indicating). A. That is right.

Q. Those are the plans? A. That is right.

Q. I show you Plaintiff's Exhibit No. 4 and ask you if those are the specifications prepared by you (handing witness), and which together with certain amendments or additions by The Prudence Company were the basis of the loan? A. Yes, sir; they are. 471

Q. Mr. Grad, did you at the beginning of this work also superintend the construction of the building? A. I did.

Q. While you were superintending the construction of the building, that is, being the architect in superintendence of construction, how many men, architects, engineers or assistants, did you have under you? A. For this particular job or all around?

472 Q. For this particular job. A. About twelve men.

Q. At that time had you also opened a branch office in New York? A. Yes, sir.

Q. And that branch office was opened not entirely but mainly, at any rate, in relation to this work that you were doing in the Essex House? A. That is right.

Q. How long were you on that job so far as superintendence was concerned? A. Well, the job started some time in October and the last day that I was on the job was June 4th or 5th. I believe it was June 5th.

473 Q. When you were last on the job in your capacity as supervising engineer, Mr. Grad, what was the general state of the building? Now very generally. A. Well, the building was what we call enclosed. Most of the brickwork was completed. The floor arches were finished almost to the top floor. They also started to lay some partitions, set some partitious, on the second and third floor.

Q. If you will just tell us very generally the different stages of construction of this particular building or any building of that size. What is the first stage? A. Well, the first thing was done
474 here was the excavation, the completion of the excavation, which was rock in this particular instance.

Q. And then what is the next general stage of the construction? A. Well, foundations are being prepared, and then columns erected for the skeleton steel frame.

Q. And after the columns are erected what is the next stage? A. Floor arches, floor construction, concrete floors being poured.

Q. The slabs across? A. That is right.

475 Q. And the general iron work? A. And they begin the enclosure of the brickwork on the outside at the same time.

Q. And your last connection with the job as the supervising architect was after the building had been enclosed? A. Enclosed; yes, sir.

Q. Generally speaking beyond that stage of construction of such a building the following stages are plastering, painting, hardware and detailed finishing? A. Yes, more or less of finishing the interior.

Q. After you left the job as its supervising architect what was your next connection with the 476 job, Mr. Grad? A. The next thing I heard from a Mr. Lukach representing Bing & Bing.

Q. And did you in the Spring of the following year, that is of 1931, go over the building and do certain work in regard to inspecting and examining the state of the work? A. I did.

Q. More particularly in relation to its conformity or lack of conformity with your plans and specifications? A. That is right.

Q. I show you a letter from Mr. Haas addressed to you, dated the 21st of May, 1929, and ask if you received that letter (handing witness)? A. Yes, sir. 477

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 86.)

Q. I show you now a letter from Central Park Properties, addressed to you, dated the 4th day of October, 1929, and ask you if you received the original of that, and whether the attached docu-

478 ments of two pages were attached at the time you received it (handing witness)? A. Yes, sir.

Mr. Schenck: I offer this in evidence.

(Marked Plaintiff's Exhibit No. 87.)

Q. I show you now a letter from Central Park Properties addressed to you, dated the 7th of April, 1930, and ask you if you received that letter (handing witness)? A. I did.

Q. I call your attention now to certain writing in blue chalk or crayon at the bottom of the letter, and ask you in whose handwriting that is (indicating)? A. This was my assistant, Mr. Jack
479 Sanger.

Q. And when that letter came for you or to your individual attention, was that note by Mr. Sanger upon that letter? A. Yes, sir.

Mr. Schenck: I offer that in evidence.

Mr. Murray: I do not think the note should go in, but only the letter.

The Court: No, I will exclude the note.

Mr. Schenck: I am going to inquire further in regard to the note, your Honor.

The Court: Well, the note is there on the exhibit, and if Mr. Sanger testified or if it is
480 otherwise identified and explained, perhaps the ruling may be different; but for the moment it is excluded.

(Marked Plaintiff's Exhibit No. 88.)

Q. After you received this letter of the 7th of April which is now Plaintiff's Exhibit No. 88, did you have any talk or conference with Mr. Haas? A. I did, sir.

Q. And who was Mr. Haas? A. Mr. Haas was one of the officers of the Central Park Properties. 481

Q. Was the talk or conference somewhere around the date of this letter or shortly after the receipt of this letter? A. I believe it was the very next day.

Q. Yes. And what was your conversation at that time? A. Mr. Haas in this letter asked me to eliminate certain items of bronze work; and I told him that the building as designed—that is, the lobby, especially, if some of this bronze—these bronze gates were omitted, it would spoil the appearance of the entire job.

Q. And what did he say? A. Well, after a considerable talk with Mr. Haas, he has agreed to replace some of those gates, which he told me he was going to order. 482

Q. You say "replace some of them". All of them or some of them? A. I believe just only about fifty or sixty per cent. of them.

Q. Mr. Grad, I show you now a certain report purporting to have been made by you on the Essex House, which report bears date the 6th of July, 1931—

Mr. Murray (Interposing): May I see that paper, please? 483

Mr. Schenck: Yes. (Handing paper to Mr. Murray.)

Q. (Continuing.) And I ask you if that is a copy of the report made by you on or about that date after the inspection of the building in 1931, concerning which you have testified (handing witness)? A. It is.

Mr. Schenck: I ask that it be marked for identification.

484 Mr. Murray: I do not know that that is the proper way of proving these items, your Honor—by a report from Mr. Grad.

The Court: It is offered only for identification.

Mr. Schenck: Yes.

Mr. Murray: Oh, I beg your pardon.

Mr. Schenck: I am going through each item, and attempt to prove them individually, before I offer the report in evidence.

Mr. Murray: That is all right.

Mr. Schenck: And then the report will be merely offered for clarification.

485 The Court: As a summary?

Mr. Schenck: Yes.

(Marked Plaintiff's Exhibit No. 89 for Identification.)

Q. Now, Mr. Grad, in this report, Plaintiff's Exhibit 89 for Identification, you have marked in the margin a certain index or notes in reference to the different items, to the plans and specifications. I wish you would hold this during the following part of your testimony (handing witness), and as we come to the different items, I shall ask you more particularly in regard to them.

486 Now, we were discussing the matter of these bronze screens referred to in the Central Park Properties' letter of April 7, Plaintiff's Exhibit No. 88; and you stated that some of the bronze screens, after conference with Mr. Haas, he had said he would order and put in, but that he did not state that he would put in all. A. That is right.

Q. I think that item is No. 37 upon your list. Will you refresh your recollection by turning to

that item, and state what you found on the building at the time of your inspection in 1931, in respect to the screens called for by your plans and specifications? A. Well, the ornamental bronze and glass screens detailed on drawings Nos. 202 and 203 were omitted from the locations between the palm room and the entrance lobby; from the breakfast room to the entrance lobby; from the entrance lobby to the foyer and the men's and women's lounge; the elevator lobby and stenographer's room; the elevator lobby and the fountain lounge. 487

Q. Now, when you had this talk with Mr. Haas was any reference made to The Prudence Company in relation to these bronze screens or doors? A. Yes; I remarked to Mr. Haas that in case those items should be omitted, that he better get in touch with The Prudence Company or the loan people, or else they may object. I did that almost on every occasion where a change or omission was requested. 488

Q. And what did Mr. Haas reply to that suggestion of yours? A. Well, that they would take that up with The Prudence Company.

Q. I show you now a letter from Central Park Properties addressed to you, dated the 9th of April, 1930, and ask you if you received that (handing witness)? A. I did, sir. 489

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 90.)

Q. I show you now a certain memorandum dated the 6th day of March, 1930, and at the top it says "A. E. Lefcourt Realty Holdings, re Building Central Park Properties", and ask you if you re-

490 ceived that memorandum—that document on or about its date (handing witness)? A. I did, sir.

Q. Who is C. W. Lush? A. Mr. Lush was in the employ of Mr. Lefcourt—one of the engineers in his employ.

Q. When you say "of Mr. Lefcourt" you mean on this particular job? A. Yes.

Q. Now, Mr. Grad, can you tell me whether or not this memorandum of the 6th of March, 1930, was a memorandum received in the ordinary course of your supervision of this job, from the Central Park Properties (handing witness)? A. It was, yes.

491 Q. And had you, before that time, had talks and conferences with Mr. Lush? A. I did.

Q. And had those conferences been in the presence of Mr. Haas—some of them? A. Yes.

Q. And you say that Mr. Lush was an engineer? A. Yes, sir.

Q. In what respect was he an engineer? A. On general construction.

Q. In general construction? A. Yes.

Mr. Schenck: I will have it marked for identification.

492 (Marked Plaintiff's Exhibit 91 for Identification.)

Q. Mr. Grad, I show you now a letter from Central Park Properties by Mr. Haas, Secretary, addressed to you, dated the 17th of March, 1930, and ask you if you received that letter (handing witness)? A. I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 92.)

Q. Now, please refer to your report, Item No. 88, and tell us in respect of this letter to Mr. Haas how many closets were omitted from the building at the time you examined it in the spring or early summer of 1931? A. Well, there were closets omitted out of at least 90 per cent. of the rooms. My recollections are that there were at least 60 or 65 rooms on the second floor; that is, in the help's quarters. 493

Q. And was that called for by your plans or by your specifications? A. It was called for by the plans.

Q. Were the plans, after the receipt of this direction from the Central Park Properties, changed? A. Yes, sir. 494

Q. By you? A. Yes, sir.

Q. Now, I have asked you to bring over your drawings, and what I call the original plans; that is, the plans on cloth. Can you, just in this particular case, to show us the method of working, point out on your cloth sheet the change that was made in that plan in relation to these closets? A. I believe I can. It was the second floor plan.

Q. I show you now the second floor plan, sheet No. 4, and ask you if that is your original cloth plan (handing tracing to the witness)? A. It is.

Q. And whether you can point out upon it the change that was made in relation to these closets? A. Yes, sir. In every instance where there was a bedroom or servant's room, you will find an erasure in the corner, and that is still in existence, where the closets were taken out. 495

Q. That is, these lighter portions on the plan (indicating)? A. Yes.

Q. And they constitute the changes eliminating the closets? A. You can see those lighter spots on here—the erasures (indicating).

496 Q. That is the light spot in each case indicates an erasure? A. That is right.

Q. Of the designation of a closet? A. Yes, that is right.

Mr. Schenck: I offer this plan in evidence.

The Court: Those changes were made on floors other than the fourth floor, were they not?

The Witness: No; only on the second floor.

The Court: Were those the servants' quarters?

The Witness: Yes.

497 The Court: Is that the second floor?

Mr. Schenck: Yes, your Honor.

The Witness: Yes.

(Tracing marked Plaintiff's Exhibit No. 93.)

Mr. Murray: May I see that, please?

Mr. Schenck: Yes (handing tracing to Mr. Murray).

Mr. Murray: This is one of the items, your Honor, of which I received notice last night.

The Court: This is not on the original

498 schedule.

Mr. Murray: No, it is not on the original schedules at all.

Mr. Schenck: That is true. It is not on the original schedules.

The Court: We will take an adjournment now until tomorrow.

The Court: Have you come to any agreement about the Schedules A and B?

Mr. Murray: I am going to do the best I can, your Honor. I have not prepared any

written matter, but I would like to dictate to 499
the stenographer just what my position is on these respective items, if that is satisfactory.

Mr. Schenck: If Mr. Murray could state the item, so that on our copy we can make the marks.

Mr. Murray: Yes, that is what I am going to do. As to Item 1 of Schedule A, we will admit that blue prints were drawn and that we will not raise the issue of the reasonable cost of those blue prints.

As to Item 38, which is the second one on the amended Schedule A, we admit as to subdivision (a) that the work was done and that 500
the cost here was the reasonable value of that work.

Right here I might say, your Honor, that we do not of course waive the claim that there was any necessity for this work.

The Court: Oh, I understand. That will be true of all your concessions.

Mr. Murray: Yes.

Mr. Schenck: Just for the purpose of clarity, it is understood that Mr. Murray in stating these details is not waiving any of his defenses. It is merely in regard to amounts.

The Court: That is my understanding. 501

Mr. Schenck: In these two schedules.

The Court: Not merely the amounts, but the fact that the work was done and the material supplied. He is not contesting the amounts, but he waives nothing on the question whether the defendants are legally liable.

Mr. Schenck: Yes.

Mr. Murray: As to subdivision (b), in that same paragraph, we admit the work and the

502 reasonable value. As to subdivision (c) we admit the work and the reasonable value.

As to Item 2 in Schedule A, subdivision (a), we deny any knowledge as to the work done or the value of the work done. As to subdivision (b) we admit that probably those bills were furnished and that they are reasonable in value.

The Court: And that the work was done?

Mr. Murray: And that the work was done, yes.

As to Item 3, we admit as to subdivisions (a) and (b) that the work was done and that
503 the value was reasonable. As to subdivision (c) we deny any knowledge of whether the work was done, or if done its reasonable value.

As to Item 17, subdivision (a), we admit that the work was done and that the amount was the reasonable value thereof. As to subdivision (b) we deny any knowledge that the work was done, but if the work was done the reasonable value thereof was probably $225.

As to Item 4, we admit each of the subdivisions, that the work was done and that the cost thereof was the reasonable value thereof.

As to Item 18 we admit the payments.

504 The Court: You admit that the current was furnished and the amounts paid?

Mr. Murray: We admit that the current was furnished and that that amount was paid.

As to Item 5, we admit a payment to Otis Elevator Company of $14,500, but deny that it was in finishing the work and that $14,500 was the reasonable value of finishing the work. As to subdivision (b) of Item 5 we deny any knowledge as to whether the work

was done or as to the value thereof if it was done. 505

As to Item 6 we deny any knowledge as to subdivision (a), as to whether the work was done and what its reasonable value was. We admit subdivision (b) of Item 6, and that the work was probably done and that $125 was the reasonable value thereof.

As to Item 7 we admit the doing of the work in the two subdivisions, and its reasonable value.

As to Item 9 we deny any knowledge as to whether the work was done, but if the ball-room floor and platform were entirely scraped 506 and finished, the reasonable value of the labor would be $210.

As to Item 10, subdivision (a) we admit that mirrors and glass were replaced, but deny any knowledge as to the amount thereof or the reasonable value. As to subdivision (aa) we deny any knowledge as to whether the work was done or its value. We admit the doing of the work in subdivision (b) of Item 10, and its value. We deny any knowledge as to subdivision (c), of Item 10, as to whether the work was done or its value.

As to Item 11 we admit the furnishing of 507 the material in subdivision (a) and its value. We admit the same as to subdivision (b). We admit the same as to subdivision (c). We admit as to subdivision (d) that $406.01 was paid to Rosenthal Hardware Company, but deny the necessity for the payment; but admit that the hardware was of the reasonable value of $406.01. We admit the furnishing of

508 the material and its reasonable value mentioned in subdivision (e) of Item 11.

As to Item 19 we admit that if firing tools were supplied, that $25 was their reasonable value, but we deny any knowledge as to whether they were supplied.

As to Item 7, insurance, we admit the paying of the insurance premium and that that was the reasonable value for insurance covering the period stated.

As to Item 12 we admit subdivision (a), as to the furnishing and the value thereof. As to subdivision (b) we have no knowledge of
509 what work was done, whether it was done, and if so what its reasonable value was. In the same way we deny any knowledge of subdivision (c), as to the furnishing of the steel door or its value if furnished.

As to Item 37, we admit the furnishing of the hardware and its value.

As to Item 20 we deny any knowledge as to whether work was done and what its value was.

As to Item 13 we admit as to subdivision (a) that the fixtures were purchased of a
510 value of $598. As to subdivision (b) we admit the purchase of fixtures of the reasonable value of $321.20.

As to Item 27 we deny everything except that certain painting was done, and deny that the reasonable value of the painting done was the amount specified. As to subdivision (b) of that Item we deny any knowledge as to whether the work was done, and deny that the amount was the reasonable cost of recalcimining 154 ceilings.

As to Item 41 we admit that the plaintiff paid these amounts specified in the Item, but deny any knowledge of whether or not they were reasonable. 511

As to Item 30 we deny any knowledge as to the amount of labor in subdivision (a) or the value of the labor, and admit as to subdivision (b) that the material was furnished and that its reasonable value was $55.

As to Item 31, subdivision (a), we admit that the shower curtains were furnished and that the amount specified is the reasonable value thereof. The same as to shower curtain pins in the same subdivision. We admit as to subdivision (b) that the missing parts were furnished and that the prices indicated were the reasonable values thereof. We deny any knowledge or information as to subdivisions (c) and (d) whether the work was done and the material was furnished, and if it was whether the cost thereof was reasonable as specified. 512

As to Item 29 subdivision (a) we deny any knowledge as to the furnishing of the gas mask and cabinet, but admit that if it were furnished the price thereof is the reasonable cost. As to subdivision (b) we deny any knowledge or information as to the doing of the work or its value if done. As to subdivision (c) we admit the furnishing of the parts and that the price was their reasonable cost. 513

As to Item 32 we deny any knowledge or information as to the doing of the work or its reasonable value.

As to Item 33 might I have this clear? It says, "Insulating of steam and incinerator pipes".

514 Mr. Judd: Insulating of steam and incinerator room.

Mr. Murray: That is what I thought. We deny any knowledge as to whether the work was done, or if done its reasonable cost.

As to Item 34 we admit that payments were made for steam as alleged in this item.

The Court: The proof is in as to that anyhow.

Mr. Murray: Yes. As to Item (4), we deny any knowledge or information as to the furnishing of the services or their value.

As to Item (5) we—these are already in,
515 too, your Honor, (5) and (6), the taxes.

The Court: You do not deny the payments, do you?

Mr. Murray: We do not deny the payments. As to Item 24 we admit the payments therein specified.

As to Item 39 we deny any knowledge or information as to the work done or its value.

As to Item 16, subdivision (a), we admit that the work was done and that the reasonable cost was probably $925. As to subdivision (b) we admit that some work was done but deny any knowledge as to the amount
516 thereof or the reasonableness of the charges therefor. As to subdivision (c) you have already proved the payment.

Mr. Schenck: Yes.

Mr. Murray: Is there anything else that you would like to have me say as to that, Mr. Schenck?

Mr. Schenck: You do not deny the reasonableness of it?

Mr. Murray: No, I do not deny the reasonableness. Really, Schedule B, your Honor, has to do with omissions which are concededly omissions and substitutions; and I do not see how that in any circumstances would come under the rule which requires denial the furnishing of it or to take up specifically the furnishing of materials and labor. 517

The Court: Whether it comes under the rule or not, it has to be faced here by way of proof or pleading. If it is possible to admit that these items were missing, it is going to shorten the proof.

Mr. Murray: Oh, you mean to admit as to their being missing? 518

The Court: Yes; and so far as substitutions are concerned, admit as to those or deny, so that we do not have this trial protracted by unnecessary proof.

Mr. Murray: No, I do not want that either. I will go through them, and will admit so far as I can, and deny where I can not admit.

As to Item 38 we admit the omission of bronze screens. Of course, your Honor, "Omission" carries with it—carries right in the word itself—a conclusion that it was required. 519

The Court: No. If you are fearful of being precluded by the use of the term or any inference to be drawn therefrom, then your admission may be, in effect, this: that there were no such items at the time of the alleged completion of the building.

Mr. Murray: Yes. I can say this: that there were certain bronze screens which were not installed on the lobby floor; but they do not say here—

520 The Court (Interposing): You say here, without admitting, that they should have been.

Mr. Murray: Yet they do not say how many bronze screens there were.

The Court: Well, they gave you the value of them.

Mr. Murray: We deny any knowledge as to the value. We admit that there were certain glass and bronze screens not inserted, but we deny any knowledge as to their value.

As to Item 40 we admit that racks and shelving were not placed in the checkroom;
521 that mail and key racks and shelving were not placed in the room clerk's office; that file racks and wood screens were not placed on the counters of the desk space; and that counter and six phone booths were not furnished; and that wood folding doors of private dining rooms were not installed; but we deny any knowledge as to the reasonable cost of installing or doing these several pieces of work.

As to Item 2 we admit that Kellastone carpet strips were not installed, but deny any knowledge as to the reasonable cost of in-
522 stalling them.

As to Item 2 (b) we admit that wood stools and aprons were not installed on 2335 windows, as alleged, but deny any knowledge as to whether the difference in cost between fireproof wood stools and metal stools is the amount stated.

As to Item 3 we admit that sanitary cove was not placed in certain cement base, but

deny any knowledge as to the amount of feet or as to the reasonable value of installing. 523

Mr. Schenck: I think you skipped subdivision (c) of carpentry.

Mr. Murray: Oh, yes, excuse me: As to Item 2, subdivision (c), we deny that wood flooring was not installed in the private dining rooms.

As to Item 43 we will admit that 56 closets were not installed in servants' rooms, but deny any knowledge as to the reasonable value of installing those.

As to Item 4, subdivision (a) we deny any knowledge as to whether the work was 524 omitted or its reasonable value.

Subdivision (b) of Item 4, we deny any knowledge as to the amount of electrical work unfinished, and its reasonable value.

As to Item 21 we admit that the mail chute was not paid for, and admit that the cost thereof would have been $4,000; but deny any knowledge as to the rental arrangement.

As to Item 22 we admit that what was paid for medicine cabinets was not the amount which was stated in the original specifications as allowance for medicine cabinets; and that 525 that difference is the amount stated.

As to Item 27 we deny that outright.

As to Item 28 we deny any knowledge either as to the work or the value thereof.

As to Item 30, subdivision (a), we admit that some plastering was not done in the barber shop, but deny any knowledge as to the value thereof.

As to subdivision (b), we admit that Keene cement wainscotting was not installed in cer-

526 tain places called for by the plans and specifications, but as to the extent of that we have no knowledge, and have no knowledge as to the difference in price between plaster and cement.

As to Item 31 we deny any knowledge as to the first four items therein—the first five items, rather, and their reasonable cost. We admit that there was no liquid soap dispenser system, but deny knowledge what the reasonable cost of that would be.

We deny any knowledge as to the siamese connections or what their cost would be.

527 We admit that radiators were not placed in the barber shop, but deny that $625 was the reasonable cost thereof.

We deny any knowledge as to valve-charts, both as to whether they were inserted, and their value if not inserted.

As to Item 32 we deny any knowledge or information.

As to Item 44 we admit that the speed of the express elevators was 600 feet per minute, but deny any knowledge as to the item claimed to be the damage item, as to whether

528 that is reasonable.

As to Item 7 we deny any knowledge or information as to this item, both as to whether there was a substitution and, if so, the difference in value.

As to Item 8 we deny any knowledge or information.

As to Item 10 we admit that 681 bedroom mirrors were installed plain and not bevelled; but we deny any knowledge as to the reason-

ableness of the amount for removing, resil- 529
vering and resetting.

As to Item 12, we deny any knowledge or information as to this item.

As to Item 13, we admit that the difference between the amount actually spent for lighting fixtures, and the so-called cash allowance stated in the original specifications, was the amount stated, $26,900.

As to Items 16-A and B, we admit that the number of fireplaces and mantelpieces therein specified were not installed, and that the original specifications provided for a cash allowance of $150 for each fireplace and mantelpiece under subdivision (a), and $250 for each fireplace and mantelpiece under subdivision (b). 530

As to Item 14 we deny knowledge or information.

As to Item 33, subdivision (a), we admit that radiators were not installed in store, but as to the number which were not installed, and as to the cost of installing radiators, we deny any knowledge or information.

As to subdivision (b) of Item 33 we deny any knowledge or information. 531

As to subdivision (c) we deny any knowledge or information, except that we will admit that if a one-year supply of gauge-charts was purchased, that $25 would be the cost thereof.

As to subdivision (d) we admit that no radiators were installed in interior bath rooms, but deny that $25,000 is the reasonable value therefor, and deny any knowledge as to the cost of cutting and patching plaster to install radiators, as stated in subdivision (e).

532 As to Item 35 we deny any knowledge or information, as to the subdivision (a).

As to subdivision (b) we deny any knowledge or information.

As to Item 39 we deny any knowledge or information. I will change that to a denial, but admit that probably the fair cost of polishing would be $111.60, if the polishing had not been done.

As to Item 36, subdivision (a), we admit that some tile was not furnished, was not installed, but deny knowledge as to the value of that tile which might have been necessary.

533 As to subdivision (b), we admit that soap dishes were installed, but that combination soap, glass and tooth brush holders were not installed in 6981 guest baths; but deny any knowledge as to the difference of $1,030 in value.

As to subdivision (c), we deny any knowledge or information.

As to the fee of general contractor or architect, we deny any knowledge or information.

The Court: All right. Now, the witness may resume the stand.

534 ———

FRANK GRAD resumed the stand:

Direct examination (continued) by Mr. Schenck.

Q. If you will turn on your list, Mr. Grad, to Item 2, I show you now a letter of Central Park Properties, addressed to you, dated December 7, 1929, and ask you if you received that letter (handing witness)? A. Yes, sir.

Mr. Schenck: The list that Mr. Grad has 535
in his hand, has been marked for identification yesterday.

The Court: Yes.

Mr. Schenck: It is his report of his investigation, and he has marked, so as to facilitate our putting in the proof—has marked in the margin certain items which correspond to the numbers on Schedules A and B.

The Court: Yes.

Mr. Schenck: And in my notes of his examination I have put those items opposite the particular letters that I am going into now, and it is merely for the purpose of facilitating 536
our handling of the matter. There is nothing evidentiary in it at all.

The Court: I understand.

Mr. Schenck: The particular item that I am inquiring about now deals with mantelpieces.

The Court: Yes. In which schedule does that fall, and can you perhaps save some effort by identifying it in the schedule?

Mr. Schenck: Yes. This is on Schedule B, on next to the last page—mantelpieces.

The Court: Item 16 of Schedule B? 537

The Clerk: Are those schedules in evidence yet?

The Court: No. They are marked for identification only.

The Clerk: They are not in evidence.

The Court: No.

Q. Now, have you that letter? A. Yes.

Q. And you stated that you received that letter? A. I did.

538 Mr. Schenck: I offer it in evidence.

The Court: These schedules that have been referred to in your admissions and denials, the clerk calls my attention to the fact that they are marked only for identification. They ought to be in evidence; otherwise, they are—

Mr. Murray (Interposing): I thought Mr. Schenck was going to amend his complaint to put these amended schedules in as the amended complaint.

The Court: Yes, I thought so too.

539 Mr. Schenck: Yes. If you will allow me, I wish now to offer in evidence Schedules A and B—not as proof of the items or the value of the items, but merely for the purposes of the record.

The Court: That is right.

Mr. Schenck: So that we may have a definite basis for our admissions and denials.

The Court: Yes. Those will be received in evidence.

(Plaintiff's Exhibits Nos. 84 and 85 for Identification, received in evidence.)

540 Mr. Schenck: Was that last letter marked —that last offer?

The Clerk: No.

Mr. Schenck: Then, please mark it now.

(Marked Plaintiff's Exhibit No. 94.)

The Clerk: That is a letter of December 7, 1929.

Q. Now, in relation to these fireplaces, when you made your investigation in the late spring of

1931, you ascertained that those had not been sold and delivered? A. Yes. 541

Q. Now, if you will turn on your list to Item No. 64—and this is with regard to substitution of terrazzo for marble—

The Court (Interposing): Item 39, Schedule B, is that it? On the last page?

Mr. Murray: That would be, rather, Item 14, would it not, your Honor, on Schedule B?

The Court: Terrazzo, 1395 square feet on first floor not polished.

Mr. Murray: This is an omission on the third page, next to the last item. 542

The Court: Oh, yes, I see.

Q. I show you now a carbon copy of a memorandum, with the printed designation of "C. W. Lush", dated the 29th of April, 1930, and ask you if you received that particular document (handing witness)? A. I did.

Mr. Schenck: I am not going to infringe upon your Honor's ruling, and I will ask that it be marked for identification, and merely use it to refresh the witness's recollection.

The Court: Yes.

Mr. Schenck: I ask that this be marked for identification. 543

(Marked Plaintiff's Exhibit No. 95 for Identification.)

Q. Mr. Grad, after receipt by you of Plaintiff's Exhibit No. 95 for Identification, did you make any changes in your plans in relation to the terrazzo? A. Yes, sir.

Q. As a substitute for marble? A. Yes, sir.

544 Q. Will you refer to page 2 or sheet No. 2 of your original plans and tell us whether or not that change by way of erasure or otherwise appears upon your cloth plans? A. No. My recollection is that there was an amendment or a changed specification and these were not erased.

Q. So that does not appear upon that sheet? A. It would be too much of an erasure.

Q. When you examined the building in your investigation, did you find that that change had been carried out in the building itself? A. Yes, sir.

Q. That is, that in certain places where your specifications had called for marble, terrazzo had
545 been substituted? A. That is right.

Q. What is terrazzo? A. Terrazzo is a composition of a marble dust, cement and sand.

Q. Is it inferior in value and in appearance to marble? A. Yes, sir.

Q. Can you tell us the extent of that substitution, referring to your report if necessary for the detail? A. Insofar as appearance is concerned of course, it makes a lot of difference whether you have a marble border.

The Court: No, the question refers to what is here in the schedule—that in the main din-
546 ing room, dining terraces, palm room, tea room, terrace, writing lounge and fountain lounge. Is that what you mean?

The Witness: Yes, sir; the same thing.

Q. If you will refer to Item 12 upon your report, Mr. Grad, I show you memorandum of the 5th of March, 1930, carbon copy, with the printed designation "C. W. Lush", and ask if you received that particular document on or about that date (handing witness)? A. Yes, sir.

Mr. Schenck: I ask that it be marked for identification. 547

The Court: What item of the schedules does that embrace?

Mr. Schenck: That is in regard to the caulking of the windows. No. 17 of Schedule A on the first page.

(Marked Plaintiff's Exhibit 96 for Identification.)

Q. After the receipt of that memorandum that particular item was omitted from the work, and when you made your inspection in the late Spring of 1931 you saw that it had been omitted? A. Yes, 548 sir.

Mr. Schenck: I shall go no further with that, because that is an item that has been admitted by Mr. Murray.

The Court: You are going to prove the value through other witnesses?

Mr. Schenck: We are going to prove no values through Mr. Grad. Mr. Murray has stated that he regards this item as a reasonable item, so I think that our proof may be very pro forma in regard to that.

Q. I show you, Mr. Grad, copy of a letter from 549 Central Park Properties, Inc., to Otis Elevator Company, dated the 18th of December, 1929, and call your attention to the designation at the left-hand lower corner thereof "C. C. Grad", and ask you if you received that document on or about its date from the Central Park Properties (handing witness)? A. Yes, sir.

550 Q. And you received that in your capacity as supervising architect and as a detail of the work being carried on at the time? A. Yes, sir.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 97.)

The Court: Mr. Schenck, wouldn't it be possible, in order to shorten this proof, for you to frame a general question, an omnibus question which would enable the witness to testify that he did certain things under instructions from the officers of the Central Park Properties—that is as to one phase of
551 his work—and, secondly, that he made an examination in the Spring of 1931 and he noted the omissions of this, that and the other thing? It seems to me unless you form some such general question as those two that it is going to take an interminable time.

Mr. Schenck: I think it is an excellent suggestion, your Honor, and I think that with the fact that the witness is subjected to cross examination as to any of these questioned items it would facilitate matters considerably if I might be allowed to finish that proof, and
552 also if we could be allowed to follow that same thing in regard to our items of completion and expenditure; because we have the vouchers here, and the bills, and there is no reason for going through a detailed form of proof if we allow our opponent to have all this evidence for cross examination.

The Court: It will certainly succeed in eliminating repetition of the same form of question in respect of all these different items.

But the proof, after all, is going to be the same, except it is going to be given in one answer instead of one hundred and fifty answers. 553

Mr. Schenck: Yes, I think that is an excellent suggestion.

Q. Mr. Grad, you have before you the report of your investigation? A. Yes, sir.

Q. In making that report you had with you your plans and specifications which had been made the basis of the loan? A. That is right.

Q. And you checked the work to see wherein there were items in that work that varied from your plans and specifications? A. That is right. 554

Q. In some cases those changes from plans and specifications had been done while you were the supervising architect on the job, and under directions in various forms given to you by Central Park Properties? A. That is right.

Q. In other cases the changes have apparently been made after you had ceased to be the architect upon the job? A. That is right.

Q. But you have made a list of all of those changes that you ascertained in your inspection? A. That is correct.

Q. And that list is the list that you have before you? A. Yes, sir. 555

Q. Does that correctly state each and every item? A. Yes, sir.

Q. And have you in the margin placed for convenient reference a reference to the particular part of plans and specifications in which the variance exists? A. That is right; page and paragraph.

Mr. Schenck: For the purpose of shortening these items I offer that in evidence as

556 prima facie proof upon the subject, and will turn over Mr. Grad for cross examination, and will be very glad to introduce any further evidence in support of any items questioned, if I may.

The Court: I think that is the way to do it, Mr. Murray. That report will be marked Exhibit 89 in evidence.

Mr. Murray: Of course, there are many items here which no claim is being made for and no mention at all in the—

The Court: That would not increase the claims.

557 Mr. Schenck: I will say there are certain items here which have been crossed out, which have been withdrawn.

The Court: They have been crossed out?

Mr. Schenck: They have been crossed out on this particular sheet, and they have been withdrawn; and I say that I am not making any contention on behalf of any items that are not on Schedule A and Schedule B.

The Court: Yes, that is understood.

Mr. Murray: Of course, your Honor, the difficulty is that so far as incomplete items are concerned, we have now Mr. Grad's

558 statement about certain items which appear in Schedule A, as to many of which we have no knowledge whatsoever.

The Court: It is your privilege to inquire about them.

(Plaintiff's Exhibit No. 89 for Identification now marked in evidence.)

The Court: The Court understands very well the rule of evidence under which this is

admissible. That is to say, the report itself would not be admissible if the witness were to say: "Well, this refreshes my recollection"; and I am sure that it does refresh his recollection as to a number of the items. On the other hand, why do we go through the form of that strict rule, when the report itself summarizes everything and the witness is here for cross examination? 559

Mr. Schenck: It may be in regard to the item of terra cotta that there is a letter here that I may wish to offer in evidence after the cross examination; but with that exception my purpose in putting Mr. Grad on the stand is fulfilled, in regard to these items. 560

The Court: You have closed your direct examination?

Mr. Schenck: Yes, I have closed my direct examination of Mr. Grad at the present time.

Cross examination by Mr. Murray.

Q. Plaintiff's Exhibit No. 4, Mr. Grad, is the original specification prepared by you, upon which this loan of The Prudence Company was made; is that right? A. Yes, sir.

Q. Under what circumstances were those specifications prepared? A. Why, preparing them for a client. 561

Q. Pardon me? A. Under what circumstances?

Q. Yes. A. Well, I was asked to prepare a set of plans and specifications.

Q. By whom? A. By the Syndicate Subscription Corporation consisting of several gentlemen from Philadelphia.

Q. Were you a member of that corporation? A. No, sir. Only for one day, when the title was

562 transferred from the Syndicate Subscription Corporation to the Central Park Properties. For some reason Mr. Lefcourt wanted me to become an officer because he could not get these gentlemen from Philadelphia.

Q. Did you have any financial interest in that proposition? A. Just loaned them some money.

Q. How much? A. $50,000 in cash and an endorsement for $50,000 on a note which I eventually paid.

Q. Did you have discussions with The Prudence Company in regard to the making of a loan to that Syndicate Corporation? A. No, but I was there
563 when the discussion took place with Mr. Toby, then the president of the Syndicate Subscription Corporation.

Q. And those discussions were during the summer of 1929, were they? A. Yes, sir.

Q. And those times these particular specifications were in existence, Plaintiff's Exhibit No. 4? A. Yes, sir.

Q. And the original plans which you saw yesterday, Plaintiff's Exhibit 5, these also were in evidence at that time (indicating)? A. Yes, sir.

Q. And these plans and specifications were prepared, as a matter of fact, for the Syndicate Cor-
564 poration? A. That is right.

Q. And that is why their name appears thereon? A. That is right.

Q. The negotiations with The Prudence Company did not culminate in a loan, did they?

Mr. Schenck: At what time, Mr. Murray?

A. Yes.

Q. To the Syndicate Corporation? A. Well, that I would not know.

Q. Don't you know that the Syndicate Corporation did not get a loan on these plans? A. I know they put up $50,000 with them. 565

Q. Don't you know whether they got a loan from The Prudence? A. No, the Syndicate did not get the loan.

Q. During the negotiations with The Prudence Company was there an estimate of the cost of the construction of the contemplated building in accordance with the plans and specifications prepared? A. An estimate by whom? By contractors, or an approximate estimate?

Q. An estimate by anybody? A. There was a tentative estimate given by Mr. Toby, then the president of the Syndicate Subscription Company, to The Prudence. 566

(Discussion between Court and counsel omitted.)

Q. In the preliminary miscellaneous work specification of these specifications, Paragraph 16, it says: "The general contractor shall include in his estimate the following cash allowance for the features enumerated". In your experience as an architect isn't it a fact that these cash allowances are mentioned in there only for the purpose of arriving at a bid from the general contractor— the total bid? A. In those particular items it is always specified just that way, rather than go into a lengthy detailed specification. For example, as to hardware, what kind of a knob or lock to use for various doors. We generally take an approximate price of one and a half per cent. We know from past experience that the price or percentage of one and a quarter to one and a half per cent. of the total job will cover hardware. Then we leave the selection of this hardware to the owner. 567

568 Q. And if the owner later selects hardware, for instance, which does not cost as much as the cash allowance isn't there some allocation made? A. Yes, sir.

Q. Between the contractor and the owner? A. Yes, sir; that is the very purpose of it, so that the contractor at the completion of the job gives the owner the difference of the amount specified and the amount actually expended. It works both ways. On the other hand, if the contractor or the owner selects hardware that costs more money, he pays the contractor the difference.

Q. Exactly. And this mention of cash allow-
569 ance is a mere estimate of what the particular items will cost? A. Should cost. Not will, but should. We do not know. It is just an approximate item. If the owner so chooses to buy fixtures, for example, lighting fixtures, for a lesser amount, why, that is his privilege. If he chooses to decorate a ballroom like in this particular case he can spend five thousand dollars, he can spend twenty-five thousand dollars.

Q. Exactly. Only I do not see here any cash allowance for ballroom. Do you remember that there was a cash allowance for ballroom? A. That was an after consideration by Mr. Lefcourt,
570 as I recall it.

Q. Is "ballroom" mentioned in this particular specification (handing witness)? A. No, sir; I think we included the entire painting. No, sir; there is no "ballroom" mentioned here.

Q. Many times the estimate in such a specification is put in a year or more before the particular articles are purchased; isn't that so?

Mr. Schenck: I object to this line of cross examination, if your Honor pleases.

The Court: Sustained.
Mr. Murray: Exception. 571

Q. After the actual work of construction started on this building, Mr. Grad, how often did you go to the building? A. I personally went to the job about once a week.

Q. Did any of your assistants go to the job? A. Yes, sir.

Q. And what did you go to the job for? A. Well, just to follow up; the regular routine of work.

Q. Did you have any contract with Mr. Lefcourt for your services on this job? A. Not in writing. 572

Q. Did you have any contract of any kind? A. Yes, sir.

Q. What was it? A. He was supposed to pay me the same amount of fee as he did on the Newark job, which was 6 per cent. of the total cost.

Q. And on that Newark job exactly what services did you perform? A. The usual architectural services. Prepared plans, specifications, and supervised the structure.

Q. When you were performing services in connection with this particular job were you acting 573 as architect for the owner of the building? A. Yes, sir.

Q. Were these the specifications which were used for the construction of the building (indicating)? A. That I could not say. Specifications were rewritten time and again by Mr. Lefcourt's staff of engineers in my office.

Q. And your office? A. And my office and in my office.

574 Q. And wasn't there an entire new set of specifications prepared? A. Well, if you call them new. They were written on new pages, but the substance of the new set of specifications is just a segregation of these specifications which were intended for a general contract and afterwards decided by Mr. Lefcourt or the Central Park Properties to let the contracts to twenty-nine separate contractors.

Q. The details of the different contracts would not have been covered by these particular specifications, would they? A. In substance they would; yes, sir.

575 Q. The details? A. Yes, sir. The detailed specifications.

Q. These are not detail specifications, are they? A. Yes, sir.

Q. These are detail specifications? A. As can possibly be made. Exact size, and concise.

Q. Will you tell me why you were spending so much time preparing other specifications? A. I was not spending any time at all. It was the organization of Mr. Lefcourt, and one of my men always set in with them, and as a result they have rewritten every section two or three times,

576 with the final result that the specification is practically the same. They came right back, with the exception of, to be sure, about seven or eight items in the entire specification changed. I checked them afterwards as to what the change was from this specification to the one that was rewritten so many times. I have it here in court.

Q. Isn't it a fact that you could not build a building on those specifications? A. That is not so. That is positively not so. The building was built, in substance and construction and everything out-

side of the omission according to this specification, or heretofore mentioned. 577

Q. Don't you know that you and the Lefcourt organization time after time, day after day, sat down to prepare sufficient specifications upon which a building could be erected? A. Well, the specifications are here, and we can prepare—as late as last night I took the first six specifications and compared them, for I knew that this question will come up, and invariably there was either one paragraph juggled into another space or a word or two added here and there, but sizes and dimensions and material is exactly identical with the original specifications. These specifications are 578 here.

Q. As the new specifications were being prepared did you at any time tell anybody in the Lefcourt organization that there was no necessity for the new specifications, that these were perfectly sufficient? A. Yes, sir.

Q. For the purpose? A. Yes.

Q. Whom did you tell that to? A. I told that to Mr. Haas.

Q. Are there included in here any plumbing specifications? A. No, sir.

Q. Are there included in here any heating specifications? A. There is a separate set of mechanical specifications. 579

Q. Are there included in here any heating specifications? A. No, sir. But they are separated there.

Q. How many specifications are there upon which the building was erected, which do not appear in here? A. Just the mechanical.

Q. What are the mechanical specifications? A. Plumbing, heating, electric work and elevators.

580 Q. Are these large items? A. Representing about 25 per cent. of the job.

Q. Do you still say that upon these specifications you could have erected the building? A. Why, there was added specifications to this here. The specification was separated from the general to the mechanical, which were in existence at the time, with this specification here.

Q. And in the same way in respect to the plans, new plans had to be rewritten, didn't they? New plans were rewritten? A. Construction plans or mechanical plans?

Q. Both. A. I had nothing to do later with the
581 mechanical plans. They were given out to a mechanical engineer by the Syndicate Subscription Corporation. On the architectural plans, however, there were changes made from time to time, on the same plans.

Q. During your connection with the work was there any time that any changes of any nature were made that you were not advised of? A. I do not believe so. Everything was brought to my attention.

Q. And when changes were suggested didn't you have some voice in whether or not the changes
582 should be made? A. I always consulted and advised with Mr. Haas and Mr. Lefcourt.

Q. And did you always compare the suggested changes with what was provided by the original specifications, to see whether the changes were in conformity therewith? A. Had to.

Q. Why did you have to? A. Why, because some changes were suggested, and one item that would materially interfere with the carrying on of

the work, with another trade, that Mr. Lefcourt perhaps had not thought of. 583

Q. The mechanical work you say is about 25 per cent. of the total work? A. As a rule the mechanical work runs 25 per cent.

Q. Do you know whether you had anything to do with the hardware or lighting fixtures or medicine cabinets or apartment refrigerators so far as the choice of the type was concerned? A. No, sir; I was off the job by the time of the finishing.

Q. When were you off the job? A. I was off the job, to be exact, June 5th, 1930.

Q. And how is that date so clear in your mind? A. By my records which I have here in court. A 584 daily inspection made by the inspector or by myself always marked what was doing on the job.

Q. A daily inspection made by your office? A. Yes, sir. Well, when I say daily, sometimes we were there twice a day, sometimes only twice a week. But every time a superintendent goes on the job he brings back a memorandum and makes a typewritten record of the progress of the job. Every day is marked.

Q. What were the circumstances under which you left the job? A. Well, I could not get my money just as I felt I was entitled to it. By that 585 time, by June 5th, I had spent close on to eighty thousand dollars in salaries and overhead, and all I have got from Mr. Lefcourt was thirty thousand, and I kept on asking for monies and I could not get them, and I finally decided that I will have to either quit or get some money.

Q. And did you start an action against Mr. Lefcourt? A. I did, the very next day, or two days afterwards.

586 Q. That action was defended? A. Well, we settled it. It did not come to court.

Q. And in that action did you claim or make any claim for the cost of the work which had been done up to the time that you left the job? A. The cost of the work? I don't recall that.

Q. What was the nature of your claim? A. Well, I would have to look that up. The nature of the claim was, I believe, three and three-fifths per cent. for plans and specifications, and the remainder of two and two-fifths for supervision up to a certain point. Now what the amount was up to that certain point I cannot recall.

587 Q. Do you remember whether or not you claimed that when you left the job in June three million dollars had been spent in construction? A. I would not be sure as to those figures unless I look up my records.

Q. Have you your records here? A. No, sir; not on my claim. I didn't think it was necessary.

Q. Can you readily find out? A. I would call up my lawyer, I guess, he is in New York here, and find out.

Q. How much money did you ultimately receive for your services? A. Altogether?

588 Q. Yes. A. About $60,000.

Q. Now, I would like to have you tell a little more in detail, Mr. Grad, just what you did, so far as supervision was concerned. You have testified that you were retained to supervise the work. Now, just tell me what you did, so far as supervision was concerned? A. Well, the principal object of supervision on this particular job, on account of being done for a builder, who was the contractor himself, was, while we have been

inspecting the work, whether it complies with the plans and specifications in a general way. The primary thing was to follow up the mechanics, and see what details were needed, see that the general work was carried out, as to heights, quality of material, and so forth, as though we were doing work for a private firm. 589

Q. Did that require actually going to the job and inspecting the work—going in there? A. Yes; it was the run of architectural supervision.

Q. Did you ever, at any time on that job, object to this or that particular piece of work? A. Yes, on many occasions.

Q. In what respect—on what particular occasions? A. Well, for instance, we had—there were several mentions made about the brick work. I spoke to Mr. Haas, and brought him out to the job—that I did not think that the brick work was as nicely laid up as it should be. He agreed with me, and told me that he would take up the matter with the mason contractor. 590

Q. You thought the mason contractor was not doing the work satisfactorily, did you? A. That is right.

Q. Now, whom did you see connected with the Central Park Properties at this time, when you say you were on the job? A. A Mr. Kiely, who was superintendent, I believe; he was the general superintendent on the job. 591

Q. Did you see anybody else from the Lefcourt organization on the job? A. Well, sometimes I met Mr. Banfield, their general superintendent, who had charge of all of his work.

Q. Is this Mr. Banfield (indicating)? A. Yes, sir.

592 Q. Did you at any time during the construction of the work, when you felt that the plans and specifications were not being followed, communicate with The Prudence Company to that effect? A. No, sir, I did not.

Q. Was it your duty to see that the building was erected in accordance with the plans and specifications? A. My duty was only to the owner, who paid me, but not to The Prudence Company.

Q. Did you know that The Prudence Company had made a loan? A. Yes, sir.

Q. To the owner? A. Yes, sir.

Q. Now, in the specifications, Mr. Grad, Plain-
593 tiff's Exhibit No. 4, there is mention of a cash allowance of $38 per thousand, I believe, for brick. Is that your recollection? A. That is right.

Q. How did you know what was actually paid for the brick? A. I did not know what was actually paid for the brick. May I correct this statement here? Something just came to me mind: I got that from my superintendent, the superintendent on the job, who told me that he had a knowledge of it, and he has made this report, but I personally—

Q. (Interposing.) He has made this report? A. The report to me as to the $35 or $38, or what-
594 ever it was.

Mr. Schenck: We are not claiming, as I have stated, any valuations through Mr. Grad.

The Court: I understand.

Q. But is this your superintendent's report or your report? A. This is my report, but the superintendent reported to me that, to his knowledge, there was so much paid for the brick, and that was put down there just in that way.

Q. How much of the information contained in this Plaintiff's Exhibit No. 89 is information which you acquired from your superintendent? A. Oh, five or ten per cent. of the items—whatever I was not sure about, I had my assistants look it up, which is the customary way of doing work in the office. 595

Q. Now, here, under 62, you state, "Brick costing $33 per thousand was used instead of the $38 per thousand brick specified on page 3, paragraph 5 of the masonry specification"? A. Yes.

Mr. Schenck: We are not claiming that item, your Honor.

Mr. Murray: You did claim it originally, in the complaint. 596

Mr. Schenck: That is all right. Go ahead, if you want to.

Q. Now, the $33 per thousand information came to you from your superintendent, you say? A. That is right.

Q. Do you know where he got that information? A. He got the information the same place I did later on—by the salesman who sold the brick to Mr. Haas.

Q. Do you claim that because brick—a particular brick cost $33 at any time, rather than $38, constituted a change in the plans and specifications? A. I would not say that. You may buy the same brick today for $33 that you could have bought two months ago for $30 or $36; but brick at the same time and on the same date that cost $33 is not the same brick that you have to pay $38 for. 597

Q. When you advised The Prudence Company that brick costing $33 per thousand was used in-

598 stead of $38 per thousand brick specified in the masonry specification, what conclusion did you want them to draw? A. I am sorry I can not answer for them, what conclusion they should draw.

Q. You had a reason for giving them the information, did you not? A. Naturally. They paid for it. They asked me to make a survey. That was my reason for giving all the information that I had.

Q. Did you claim, then, to them that there was a breach of the specification because the Central Park Properties paid $33 per thousand for brick
599 instead of $38 per thousand? A. Yes. To my knowledge at that time I have gone over the specification, and I found that the specification called for a $38 brick per thousand; and the information that I have got, as I stated before, from my assistant, that the brick was paid for at $33 a thousand, and in order to make sure, I called up before I have written this report—I called up a Mr. Gibson, who sold the brick, and he told me that that brick cost $33, and I based my report on that.

Q. Do you claim that under this specification that the Lefcourt organization had to pay $33 per
600 thousand for brick? A. No, sir, no more than they had to pay $50,000 for hardware. They could select any amount. They could select brick at $20, as far as I was concerned.

Q. So far as you were concerned? A. Yes; if the owner wanted to buy a cheaper brick, that was within his prerogative. It was my place to tell him that the brick was not as good, but if he wanted to use it, it was within his province.

Q. My question was not as to your concern, but as to whether, if they did not pay $38 per thousand for brick, there was a breach of the specification? A. No, I would not say that. 601

Q. Then, would you say that there would not be a breach of the specification? A. That is right; but they would be entitled to a credit—

Q. (Interposing.) No. A. No, there was no breach of the specification. I will put it that way.

The Court: It was all common brick, I suppose?

The Witness: No, sir.

The Court: Face brick?

The Witness: Yes, face brick. 602

The Court: Is there anything in the specification about the quality of the brick or the kind of brick?

The Witness: No. We generally specify so much per thousand.

The Court: And that means brick of a certain quality?

The Witness: Yes, brick of a certain quality—either more porous or denser brick.

Q. And the brick that might have cost $38 a thousand at the time this specification was prepared, one year later might cost $33 per thousand? A. More or less, yes. 603

Q. So that the mere fact that $33 per thousand was paid for brick instead of $38, of itself, would not constitute a breach of the specifications? A. No, sir.

Q. Before you advised The Prudence Company as to this claimed discrepancy in the cost of brick, did you find out or did you know whether the brick

604 actually installed, after having been bought for $33 a thousand, was first quality brick? A. Why, I went to the job just as the brick was unloaded, and I could see that the majority of the brick was not first quality.

Q. So that when you examined the building you saw that the brick was not first quality? A. A large majority was spalled. The brick was spalled, and I immediately—it was chipped on the corners, which turns it into a second quality brick, and I immediately notified Mr. Haas to that effect; and I believe he had a couple of loads shipped back or changed.

605 Q. The defect was in what respect? Would you say because it was chipped? A. Yes, most of the bricks were chipped.

Q. But the inherent quality of the brick was all right, is that right? A. It was not as dense a brick as I intended that it would be for that price. It was more of a porous brick.

Q. Did you see samples of the brick? A. Yes, I saw them.

Q. Which was purchased? A. Yes.

Q. Which the Prudence Company approved? A. I don't know what the Prudence Company ap-

606 proved.

Q. Well, did you see samples? A. Yes, I saw many a sample.

Q. Did you see the particular samples which were bought for this building? A. I did.

Q. And you now say, do you, that the brick which was bought was not the brick which you had in contemplation when you drew the specifications? A. I did not say anything of the kind, no. I just said that the sample I saw was not chipped,

and was all right; but the majority of the brick 607
that were brought to the job were chipped, and that is why I called them "second quality".

Q. But the brick which was brought to the job conformed with the sample, except in the case of chipping? A. Yes, it did.

Q. Then, the brick that was brought to the job inherently was the same brick? A. Yes.

Q. (Continuing.) As was purchased from the sample? A. That is right.

Q. Do you know whether or not there had been a decline in the price of brick from the time that the specification was drawn until the time the brick was purchased? A. I could not remember. 608
Prices were fluctuating at that time. I don't know whether the market was just up or down then. I wouldn't say.

Q. And I understand you to say that the mere fact that brick cost $33 a thousand instead of some arbitrary figure of $38 a thousand in the specifications, does not constitute a breach of the specification? A. It does not. I might add that that would be to a greater extent, if you wanted to use a brick, say, for $20 instead of $38, in that the building would be damaged to a great extent, of course, regardless of whether the contractor gave 609
the owner an allowance or not.

Q. I think we all agree on that, Mr. Grad. A. I just wanted to make myself clear on that point.

Q. When $38 a thousand is specified at a particular time, and a particular type of brick is in mind, if you can buy that brick later on for a better price, that is all right? A. Perfectly all right.

610 Q. And if you have to pay more for it later on, that is all right too? A. Provided it is not a marked difference or to a very marked degree.

The Court: The reference here is wholly to quality, and not the price.

Q. Now, would your answer be the same, Mr. Grad, so far as apartment refrigerators are concerned, where a price or an allowance of $70,000 is mentioned in the specifications? A. Hardly. I do not think the same thing would apply, no, because if you bought a cheaper product—a cheaper brick, and the brick is porous, your walls will leak
611 forever after. On the other hand, if you buy—if you have, say, 700 apartments, and if you buy a cheaper refrigerator, and it does not work, you keep on throwing them out gradually, and replacing them with a better grade of refrigerator, so I do not think you can hardly compare one with the other.

Q. But it is still possible, is it not, that when in May, 1929, a cash allowance is stated to the contractor who was going to bid, of $70,000 for apartment refrigerators installed, that the refrigerators might be obtained for a considerably lesser
612 amount? A. Yes, sir.

Q. By the time it came to install them? A. That is right.

Q. And that the quality of the refrigerator might not be in the slightest affected? A. That is true.

Q. Now, as matter of fact, when these specifications were drawn it was contemplated that there would be a general contractor for the job, is not that so? A. Yes, sir.

Q. Is not that so, Mr. Grad? A. Yes, that is correct. 613

Q. And that, as matter of fact, when the Lefcourt organization took it over, there was no general contractor? A. No, sir; Mr. Lefcourt became the general contractor.

Q. It did the work itself? A. That is right.

Q. And in the event of the letting of a contract to a general contractor upon these specifications, after the close of the work, there would have to be some sort of settlement between the owner and the general contractor? A. That is correct.

Q. As to these items? A. That is correct.

Q. And is not that the only purpose—the only reason that these cash allowances were put in here? A. That is right. 614

Q. Now, taking the matter of the fireplace mantels, Mr. Grad, these fireplace mantels appeared on the original plans? There was a place indicated for their installation? A. Yes, sir.

Q. And under this same preliminary and miscellaneous work specification, paragraph 16, cash allowances, it is provided that the general contractor shall include in his estimate the following cash allowances for fireplaces, 18th to 38th floors, $150 each? A. Yes. 615

Q. And then for the next two floors, $250 each? A. Yes.

Q. I now ask you to look at Item 6 of that document (handing witness).

Mr. Schenck: What is that, Mr. Murray?

Q. Will you read what that says? A. Yes. "Wood floors in private dining rooms omitted, and finished cement floors installed instead."

616 Q. When did you look at the building—when did you examine the building for The Prudence Company? A. I examined the building between the 1st of June and the 1st of July.

The Court: Of what year?

The Witness: 1931. The last week of May, perhaps.

Q. How many private dining rooms are there? A. There are none now in the building; as I recall there were some changes made afterwards; but there were three designed originally.

Q. There are no dining rooms now? A. My
617 recollection is that there are not. I have not been in the building for about a year or so. They eliminated those.

Q. When you were there in June did you see that the wood flooring was absent from these private dining rooms? A. Yes, sir.

Q. Was there anything to indicate that there had been originally wood flooring on there, and that it had been removed? A. All I saw was cement floor. If it had been there and removed, there were no marks of identification of it, that I could see.

618 Mr. Murray: Now, I do not know how far to go on this question as to the flooring in the dining rooms; but Mr. Billsborrow's report states that there were wood floors in these private dining rooms in December, 1930, and—

The Witness: There were several—

Mr. Murray (Continuing): —and I wonder whether, under the circumstances, you are still going to claim, Mr. Schenck, that

there was no flooring there? The only thing that Mr. Billsborrow stated was that they still needed to be scraped and finished. 619

The Witness: There might have been a question as to some other dining room. There were so many dining rooms, that perhaps he called it "private". There was really a palm room and a breakfast room. There was a main dining room floor.

Mr. Schenck: We will possibly be able to clear up any ambiguity in that respect. Certainly, if wood floors were there, we are not going to claim any item of damage for them.

620

Q. Well, tell me again, Mr. Grad—you said something about different dining rooms. You say there were three private dining rooms, and there was a main dining room? A. Yes.

Q. Were the three small dining rooms at one end of the building—at a different end of the building from the main dining room? A. Yes, just directly on the opposite side.

Q. And on what street side was the main dining room? A. The main dining room was toward Sixth Avenue.

Q. That was toward the west? A. Toward the west, yes.

621

Q. And the small dining rooms were toward the east? A. That is right.

Q. And you say that the small dining rooms are not now there? Did you say that? A. Yes, sir. I have subsequently prepared a plan for Bing & Bing, and removed all these dining rooms, and put a kitchen there. They took the kitchen off the ground floor, from the basement, on to the main floor, and by reason of that, removed those private dining rooms.

622 Q. In addition to these three private dining rooms and the main dining room—those are all the dining rooms that there were on the main floor, is not that right? A. No, sir, there was another dining room—there were two more of these on the front of the building, and one of them which they called a palm room, and one a tea room; but they were all classified as "dining rooms".

Q. Now, was the palm room a small room or otherwise? A. It was a larger room. The private dining rooms were very small rooms—just the size of a good sized bedroom or perhaps a dining room in an ordinary home.

623 Q. And how large was the tea room? A. That was quite a size. The tea room was almost as large as this room here.

Q. Did you look at the main dining room when you made your visit in June? A. Yes, sir.

Q. In paragraph 5 you state that the floor needed to be scraped and finished? A. That is right.

Q. Was there anything to indicate, from your examination, whether the floor had ever been scraped or finished? A. It did not look that way. It was very rough. If it was scraped, the job was done so poorly that it really needed new scraping.

624 Q. Is it not possible that it might have been once scraped and finished? A. Yes.

Q. And in the interim that it had been tracked over so much that scraping and finishing was required again? A. Yes, that is likely to happen.

Q. Would you make the same answer as to the dance floor in the main dining room? A. I thought that was the floor you were referring to. The ballroom really is the main dining room. Sometimes they called it the ballroom.

Q. Yes, I made a mistake. In paragraph 5 I saw "Main dining room", and that meant the musicians' platform in the main dining room? A. Yes. 625

Q. And the one now that we are speaking about is what you had originally thought I meant? A. Yes, that is right.

Q. Look, now, at 9, Mr. Grad, and tell me what you mean by "chair rails" (handing witness)? A. A chair rail is a rail that comes within the height of a chair; just to strike the top of a chair —molded wood, generally about four inches wide; varying anywhere from three and a half to four and a half inches. 626

Q. Is it attached to the wall? A. Yes, fastened to the wall.

Q. Against which chairs might rub, is that right? A. Yes, instead of damaging the plaster.

Q. Do you remember, Mr. Grad, any conference at which the question of the omission of radiators from interior bathrooms was considered? A. Yes. sir, very much so. There was quite a discussion about those.

Q. And there were at least seven or eight people present? A. That is right.

Q. At those discussions? A. Yes, at various times. 627

Q. And some people were of the opinion that it was unwise to put radiators in interior bathrooms?. A. Yes.

Q. And some people thought it was advisable? A. That is right.

Q. Do you remember that reports were made as to whether this, that or the other apartment hotel had radiators in the interior bathrooms? A. That is right.

628 Q. And that certain ones mentioned did not have radiators? A. Yes.

Q. And that certain others mentioned did? A. Yes.

Q. And the specifications—the heating specifications, when finally drawn, for the heating and steam fitting contractor— A. Redrawn, you mean?

Q. Yes, drawn and redrawn—they were drawn and redrawn a number of times, were they not? A. I just wanted to be clear on it. When the plans were first drawn, the radiators were shown located in the bathrooms; but when it was finally
629 decided by the Syndicate Subscription Corporation to eliminate the radiators, and among other various changes that were made in these plans, the radiators were eliminated entirely from the bathrooms—

Q. You said "Syndicate Subscription Corporation"? A. Yes.

Q. Well, did you mean "Syndicate Subscription Corporation"? A. No, I meant the Central Park Properties. That is right.

Q. Now, at the time the loan was made there were not heating specifications drawn? A. Oh, yes, there were. Very much so.

630 Q. Are they in here? A. They are in the court room somewhere. If they are not in here, they are separated as I stated before for the various mechanics, but they were a part of the specifications submitted to The Prudence Company. I brought them up there myself.

Q. These are the— A. General specifications.

Q. The general specifications? A. Yes.

Q. Which have been offered in evidence as the specifications upon which the loan was granted?

A. I am sorry I cannot answer for what was offered in evidence, and what was not, but the specifications were in existence. 631

Q. Were you there at the time the arrangement of the loan was completed by the Central Park Properties? A. I was not there, no.

Q. In this particular specification there are no heating specifications? A. Oh, yes, there were. They were attached, but it was a separate addendum—mechanical specifications, blue-printed.

Q. Look at Plaintiff's Exhibit No. 4 and say whether there are any heating specifications there (handing witness)? A. No, there are none in there. 632

Q. Later on, after the Central Park Properties obtained the loan, and the specifications were rewritten, it was first decided to put the radiators in, was it not? A. Well, there were a lot of discussions pro and con on that. Mr. Lefcourt and Mr. Haas had three or four of their own men there—engineers—and as I recall, he sent them out to make inquiries at different hotels; and some of them brought back a report that there were radiators in the bathrooms, and others that there were not; and after they finally decided to eliminate them— 633

Q. (Interposing.) And ultimately an addendum was written to the heating specifications providing for the omission of radiators in the interior bathrooms? A. My recollection is that there was no addenda written. They were just eradicated from the original tracings; just erased from the tracings.

Q. I show you now the specification for heating and ventilating, which is marked Defendants' Exhibit G for Identification, Mr. Grad, and ask you

634 whether that is not the specification which the contract ultimately proceeded under (handing witness)? A. Well, I would not be able to testify to that very well.

Q. Would you not recognize it? A. I would recognize it as a copy, perhaps, but this job was given out directly from Mr. Lefcourt to the engineer, Mr. Kingsley, and their dealings were separate and aside from my own.

Q. You would still have something to do with the preparation of the specifications? A. No.

Q. No? A. The specifications were also prepared by Mr. Kingsley, the mechanical engineer.

635 Q. Would any of the mechanical specifications be prepared by you? A. No, sir. They would just send a copy to my office, to sort of coordinate the work in conjunction with the structural work.

Q. Then, is it so that in all of the mechanical matters that you would not draw the specifications? A. No, sir; those are drawn by the mechanical engineer, and just checked in my office for comparison or interference with other work.

Q. Mr. Grad, when was it that you first went on the job for The Prudence Company in the Spring of 1931 to make a report for the company? A. I

636 believe it was the last week in April or around the 1st of May.

Q. How long did you take to examine the building? A. Oh, about six or seven weeks.

Q. Did that mean you were there each day? A. No.

Q. Every day? A. No, sir.

Q. Do you know how many days you were there? A. Oh, I must have been there at least a dozen times, myself. Then I had two other men check up during intervals. One man might have

been there every day or every other day, and sometimes another man went on. 637

Q. Have you any record to show just how much time was spent on the job? A. I have them somewheres. They must be filed away. It is three years now.

Q. At any time after you left the Lefcourt organization, or rather at any time after June, 1930, when you say your connection with this job ceased, and prior to December, 1930, did you have any talk with Mr. Waterman of The Prudence Company? A. Yes, I believe I had.

Q. And what was the nature of the talk that you had with him? A. I just told him that I was 638 —I was to see him about another loan, to start with, and I told him that I had severed connections with the job and if anything goes wrong not to hold it against me because I am through.

Q. And didn't you tell him at that time about certain things which in your opinion were not in accordance with the plans and specifications?

Mr. Schenck: I object to this on the ground that it is irrelevant and not proper cross examination.

The Court: What is the pertinency of it?

Mr. Murray: Well, if Mr. Waterman, the 639 president of The Prudence Company, knew at that time, your Honor, of changes in the plans and specifications and these changes were satisfactory to The Prudence Company, I do not see how they could claim now against this surety company.

Mr. Schenck: By the form of our agreement we had attempted, at any rate, to exclude any such matters. A specific clause in

640 the bond states there would be no waivers except in writing.

The Court: I sustain the objection.

Mr. Murray: I might say, on that question of waiver, your Honor, that even though there is a specific provision in the contract that none of its provisions may be waived except in writing, that very provision may be waived.

The Court: No.

Mr. Schenck: But this was in the bond.

The Court: I will sustain the objection.

Mr. Murray: Exception.

641 *Redirect examination by Mr. Schenck.*

Q. Just one or two questions, Mr. Grad. You have stated that you delivered the specifications to The Prudence Company before this loan was made? A. Yes, sir.

Q. I show you Plaintiff's Exhibit No. 4 and ask you if that is a part of the specifications which you delivered to The Prudence Company (handing witness)? A. Yes, sir.

Q. I show you these five folders of specifications, four of which are blue prints and the fifth having a brown cover, and ask if at the same time

642 you delivered Plaintiff's Exhibit No. 4 you delivered those five additional specifications to The Prudence Company (handing witness)?

Mr. Murray: I object to the question as immaterial and irrelevant.

The Court: I take it these are the mechanical specifications concerning which you cross examined the witness, and in consequence I overrule the objection.

Mr. Murray: They have offered in evi- 643
dence, your Honor, certain specifications as the specifications upon which the loan was granted. Now they are having Mr. Grad testify that at some time previous to the granting of this loan he had submitted to The Prudence Company certain additional specifications.

The Court: It having been brought out in cross examination, I shall permit the introduction of these exhibits. Not because there was a change in the agreement between the parties, or the terms of your bond, but merely 644
to explain what the witness referred to in answers given on cross examination.

Mr. Murray: It is perfectly satisfactory to me, if it is understood that the mere answer of Mr. Grad now will not be construed to mean that these were part of the specifications upon which the loan was granted.

The Court: I do not know whether it was or not. The question merely goes to the delivery of these specifications to somebody, some officer of The Prudence Company, at the time that Plaintiff's Exhibit No. 4 was delivered. 645

A. Yes, sir; I delivered these specifications at the same time with the specifications for the general construction.

Mr. Schenck: I offer them in evidence.

(Marked Plaintiff's Exhibits Nos. 98, 99, 100, 101 and 102.)

Q. Mr. Grad, these specifications, Plaintiff's Exhibits Nos. 98, 99, 100, 101 and 102 are equally

646 with Plaintiff's Exhibit No. 4 specifications prepared by Frank Grad, Architect, of No. 521 Fifth Avenue? A. No, these specifications were prepared by my engineer, Mr. Kingsley.

Q. But he was in your organization? A. No, he was just employed by me as a mechanical engineer having a separate organization.

Q. Yes, but they were prepared— A. Through me.

Q. Through you. And just in that connection, Plaintiff's Exhibit No. 4 was prepared by a particular specification man employed by you? A. Always. All specifications are.

647 Q. Some suggestion has been made by the other side that these specifications are not sufficient to erect a building completely. What can you tell us in regard to the experience and qualifications of that specification man employed by you? A. Well, the specification writer who has written this specification in detail after my giving him instructions as to the general character, has been prepared by a man who has been in the employ of Mr. John Russell Pope as a special specification writer, and Mr. John Russell Pope has constructed, designed and supervised buildings all over the country,

648 some of the finest, here and abroad.

Q. How long had he been in Mr. Pope's employ? A. Nine years before he came to me.

Q. How long was he in your employ? A. Five years.

Q. Mr. Grad, you have been cross examined in regard to this item of brick which was placed by you in your report as an item on which The Prudence Company might claim a variance between the specifications and the work. As I understand

it, it was some attack upon your fairness. Did you at the time you included that brick claim in your report fairly and honestly believe that a claim against the bonding company was justified on that item? A. Absolutely no. 649

Q. Do you at the present time fairly and honestly believe that a claim against the bonding company is justified on that item? A. Well, I do not know whether it is against the bonding company. I know it is against somebody. The building has suffered. It is not up to me, I don't think, to decide whether it is against the bonding company.

Q. You believe there is a claim, regardless of whom it is to be directed against? A. Yes, sir; positively so. 650

Q. Will you tell us why? A. Well, in the first place because I thought by using a cheaper brick the brick might be somewhat of an inferior quality, on account of being porous, and there was danger of it being a second, and as a result, and proof that my assumption was correct, I have been on the job only two weeks ago and I have found the assistant manager who took me up to the tower floors where we could go out on the terraces, and he has bitterly complained—

The Court: No. 651

Q. No, we will not have anything except your own observation. A. I see. Well, my observation—

Q. In the first place, you saw the samples that had been approved by The Prudence Company in respect of this brick? A. Yes, sir.

Q. Were those samples chipped? A. No, sir; they were perfect.

652 Q. Were those samples cracked on their surface? A. They were not.

Q. You saw this brick that was delivered at the job? A. I did.

Q. Was that brick chipped and cracked? A. A very large percentage of it.

Q. What is the location of this building so far as exposure to weather is concerned? A. Well, the main facade faces north.

Q. And immediately to the north is the exposure of Central Park? A. That is right.

Q. How tall is the building, approximately, so far as its tower is concerned? A. Forty stories.

653 Q. Did you anticipate when you drew the specifications that a brick of the quality indicated by $38 per thousand was necessitated because of the exposed position? A. Yes.

Q. Particularly in respect of the tower? A. That is right.

Q. Did you think that brick of this quality actually delivered, particularly when placed upon the tower of this building, would result in leakage because of the driving pressure of the rain against it? A. I did.

Q. Have you on subsequent investigation found that that brick has had to be waterproofed a num-

654 ber of times? A. Yes, sir.

Q. And in a number of locations? And I am not referring to repointing, but the surface of the brick itself. A. Yes, I found that the entire surface of the tower floors, especially on the side that I could observe from the balconies or from the terraces, has been surfaced with a waterproofing, just due to the fact of these chips and spalls having absorbed moisture.

Q. From all the facts that you have ascertained in regard to this brick at the present time do you believe that that brick is inferior to the brick intended by your specification? A. Yes, sir. 655

Q. Some suggestion was made on your cross examination that there might have been substitutions of more valuable materials and therefore a general improvement over and above your specifications. I call your attention particularly to the item of terra cotta, and show you a letter of Central Park Properties addressed to you, of the 15th of November, 1929, and ask if you received that letter (handing witness)? A. Yes, sir.

Mr. Schenck: I offer it in evidence. 656

(Marked Plaintiff's Exhibit No. 103.)

Q. Mr. Grad, in this letter Mr. Haas refers to a cutting down of some 25 to 30 per cent. of the amount of terra cotta. Had you previously had conferences and discussions with Mr. Haas in regard to that subject? A. I did.

Q. And had you under his direction prepared plans in which the amount of terra cotta used was cut down? A. Yes, sir.

Q. Some 30 per cent? A. Yes, sir.

Q. After this were there further discussions in which the amount of terra cotta was further cut down, or does this period of time mark the final condition of the terra cotta on the building? A. It was not cut down any more than this. 657

Q. So that the terra cotta was cut down in amount approximately 30 per cent? A. Yes, sir.

Q. What was the use of terra cotta on this building? Was it used on the facade of the building? A. Yes, sir, only.

658 Q. For what is terra cotta used, and what is it? A. Terra cotta is a clay baked and glazed.

Q. Is it a decorative feature? A. A decorative feature, instead of stone.

Q. This property facing Central Park, this building facing Central Park, is a building that can be seen from a distance, so that the decorative feature of it is an important feature of the building? A. Yes.

Mr. Murray: I object to it as leading.

The Court: Yes. You have been leading him right along.

659 Q. To your mind did the cutting down of that terra cotta affect the building? A. Well, insofar as looks and design, it did to a great extent.

Q. What was approximately the saving in dollars? He refers here to your receiving bids and negotiating in regard to the terra cotta. Speaking approximately, what was the saving in dollars by the reduction of the amount of terra cotta by 30 per cent? A. Well, I do not believe I have ever seen any terra cotta figures on the job, and I could not really say what the saving was; but I know there was 30 per cent. of the terra cotta saving, as Mr. Haas states here in the letter himself.

660 Q. I might in that connection ask you if this is a photograph of the building from the Central Park, and does that show something of the terra cotta decorations (handing witness)? A. Yes, sir; it does. Very faintly, but—

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 104.)

Mr. Murray: Will your Honor permit me to ask one further question on first cross?

The Court: Oh, yes. 661

Mr. Murray: Which I really had forgotten to ask.

Recross examination by Mr. Murray.

Q. I understood you to say, Mr. Grad, that you had prepared plans and specifications for some changes in the lower floor of this building for The Prudence Company. A. For Bing & Bing.

Q. Will you tell us what these changes were? A. Well, the principal change was taking the kitchen, the main kitchen, from the basement up to the first floor.

662

The Court: He told us about that this morning.

Q. Were there any structural changes in order to accomplish that change, Mr. Grad? A. Very few structural changes. Mechanical mostly.

Q. What other changes were there in addition to the changing of the kitchen from the lower to the upper floor? A. The only additional work I did was design a marquee in front of the building, a canopy at the entrance.

Q. What was the result of changing the kitchen from the lower floor to the ground floor; what was necessary to be done in order to accomplish that? 663
A. We eliminated those private dining rooms we spoke of this morning.

Q. You eliminated the private dining rooms? A. That is right.

Q. What became of the private dining rooms? A. Why, to my knowledge I have not prepared the plans for that. There were some of them shifted to the second floor without my having anything to do with it.

664 Q. Wasn't there a change on the first floor involving the so-called barber shop? A. Not to my knowledge.

Q. Is there a barber shop now on the first floor? A. I believe there is, but I would not be sure about it. I have not been on 58th Street in a couple of years now.

Q. How many plans did you draw for those changes? A. Just one plan.

Q. Did you supervise the work? A. I did not supervise the work. I just turned it over to Mr. Lukach.

Q. Do you know who the masonry contractor
665 on this job was? A. I knew the name of him, but I cannot recall. I only met the gentleman about two or three times during the course of construction, the contractor himself. McNally, I believe, it was, if I am not mistaken.

Q. Had you ever met McNally before in construction work? A. No, the first time I met him was through Mr. Haas.

Q. This is the first job which you ever had in New York, is it not? A. That is right, and the only job.

Q. So that at that time you were not able to state or you had no knowledge whether or not
666 McNally was a first-class masonry contractor? A. I knew that McNally ranked as a very good contractor.

Q. Did you know, although you had never met him on any other job, that he had completed some of the largest buildings here in New York City? A. Yes, sir.

ARTHUR S. LUKACH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows: 667

Direct examination by Mr. Judd.

Q. Have you given your full name and address to the reporter? A. I have.

Q. Tell us what your occupation is? A. I am a civil engineer.

Q. Can you give us briefly your experience and training as a civil engineer? A. I am a graduate civil engineer; I am licensed in the State of New York as a practicing engineer, and I have had fifteen years' experience in the building construction 668 industry.

Q. A graduate of what school? A. New York University.

Q. What sort of buildings had your construction experience involved? A. It has involved practically every type of building: apartment houses, hotels, loft buildings, and a theatre.

Q. Can you tell us a few of the apartment houses and hotels the construction of which you have had to do with in your capacity as a civil engineer? A. The Berkshire Hotel, 52nd Street and Madison Avenue; apartment houses at 1175 Park Avenue, 139 East 94th Street; the Keith-669 Albee Theatre, New Rochelle; the Heckscher Building, an office building at 57th Street and Fifth Avenue; the Textile Building, 295 Fifth Avenue; the DePinna Building, 52nd Street and Fifth Avenue; and a number of others.

Q. What is your present occupation? A. I am employed by Bing & Bing.

Q. And how long have you been with them? A. A little over four years.

670 Q. And before that what was the nature of your work? A. Before that I was employed by George Backer, Inc., in charge of their building construction.

Q. And what was the nature of your duties in connection with building construction? A. I awarded the contracts, took estimates, prepared the specifications, and supervised the construction.

Q. You were in general charge of the work? A. I was.

Q. You are familiar with the reading of plans and specifications? A. I am.

Q. Are you familiar with the completion of
671 building construction work? A. I am.

Q. Can you tell us what problems are involved in the completion of a building, which differ in any way from those involved in straight construction work?

Mr. Murray: That is objected to as immaterial and irrelevant.

The Court: Overruled.

Mr. Murray: Exception.

A. In general, the completion of a building is a much more difficult task, and takes a longer time. When the steel and excavation and masonry take
672 place, it goes comparatively quickly, but the completion of an unfinished building, because of the details of construction, takes time.

Q. Is there any greater expense or greater labor involved in completing a building after work has been abandoned than the completion of it while the work is going along in the regular course? A. I should say yes.

Q. In what way? A. It is necessary for the new contractors to pick up the threads where the

old ones left off, and time is spent in getting the job organized; whereas, if they had already started on it from the beginning, they could go through quickly and more expeditiously. 673

Q. Can you tell us how the size of Essex House compared with other apartment hotels on which you had worked? A. It was the largest one.

Q. And how did it compare with other apartment hotels in New York? A. To the best of my knowledge, I think it is the largest apartment hotel in New York.

Q. When was your first connection with Essex House? A. My first connection with Essex House was in March of 1931. 674

Q. And will you tell us what you were instructed to do in relation to it, and how your connection with it came about? A. I was called into the office—one of the offices of Bing & Bing toward the end of March, 1931, and was told that I was to go up to the Essex House in the capacity of what they called a project manager, and to do two things: first, to make a survey of the building; and, secondly, to complete it.

Q. Were you at that time given the plans and specifications on which the building had to be built? A. I was.

Q. I show you now Plaintiff's Exhibits Nos. 4, 98 to 102, also Plaintiff's Exhibit No. 5, and ask you if those are the plans and specifications which were given to you at that time (handing papers to the witness)? A. They are. 675

Q. Those are the plans (indicating)? A. These are the plans, yes.

Q. And did you examine those plans and specifications? A. I did.

676 Q. About how much time did you spend in studying them? A. A number of days.

Q. Did you examine the building to determine the extent to which it had been completed in accordance with the plans and specifications? A. I did.

Q. Will you describe for us the manner in which your examination of the building was conducted? A. When I first went to the building I engaged an assistant, and we started to make a very minute inspection of all the rooms and spaces in the building. We recorded our observations in a number of note-books, and on loose sheets of
677 paper, and they were tabulated, first as to the rooms, and secondly, after that, as to the trades involved.

Q. Are these the note-books in which your observations were recorded (exhibiting)? A. They are.

Mr. Judd: I ask that they be marked for Identification.

(Books marked collectively Plaintiff's Exhibit No 105, for Identification.)

Q. Approximately how long a time—

678 Mr. Judd: That is four note-books and two folders of loose pages.

Q. Approximately how long a time, Mr. Lukach, was spent by you in your study of the building? A. I should say between four and five weeks.

Q. And how great a portion of that time did you spend at that during those four or five weeks—yourself and your assistant? A. We spent altogether between four and five weeks, as I remember.

Q. How many rooms are there in this building? 679
A. I think, 1187; and then there are maids' rooms and additional dining rooms and so forth.

Q. Did you visit every room? A. I personally did not, but my assistant did.

Q. About how many trades or specific subdivisions of the specifications and plans were to be considered? A. I should say there might be between 15 and 20 trades.

Q. And did you examine each room to determine the extent of compliance with the specifications and plans as to each of those individual trades? A. Each room was examined.

Q. Were you given, at the time you entered the 680
building, any information as to the extent to which it complied with the plans and specifications? A. Will you repeat that question?

Q. I say, at the time you entered the building were you given any information with respect to the extent to which it complied with the plans and specifications—the extent to which it had been completed in accordance with the plans and specification? A. No, I was not.

Q. I show you now Plaintiff's Exhibit No. 64, for Identification—a report from Mr. Billsborrow to Mr. Braislin, dated February 20, 1931, and ask you if you have seen that before (handing wit- 681
ness)? A. I have.

Q. Did you have that at the time that you examined the building? A. I did.

Q. Did anyone besides your assistant and yourself examine the building in relation to the extent of completion? A. Yes.

Q. Can you tell us who that was? A. Mr. Grad, and then later on a representative of the bonding company.

682 Q. Did you know at the time that you entered the building that a bonding company was interested in the matter? A. Interested in the inspection or just general interest in the building?

Q. Interest in completion of the building. A. No, I did not.

Q. When did you first learn about the fact that a bonding company had guaranteed the completion of the building? A. When I was told to take charge.

Q. I show you now Plaintiff's Exhibit No. 66, and ask you if you knew of the sending of that letter (handing witness)? A. I did.

683 Q. The date of that letter is March 31. When did your inspection of the building begin? A. The beginning of April.

Q. And did any representative of the surety company join you in that inspection? A. They did not.

Q. When was the first that you heard from any representative of the surety company? A. About six weeks after I started the inspection.

Q. Can you give us the exact date? A. I think it was in the latter part of May. I can not give the exact date.

684 Q. I show you now a letter dated or a copy of a letter dated May 27, from the 5859 Realty Corporation, signed by yourself, to Keeler, Inc., and ask you whether that refreshes your recollection as to the date when the surety company's representative first appeared (handing witness)? A. Yes. I should say it was a few days before the date of this letter that I first saw their representative.

Q. And who came from the surety company? A. A Mr. Clark and a Mr. White.

Q. And who were they? A. As I recall, Mr. 685
White said he was an attorney connected with the Fidelity & Deposit Company; and Mr. Clark said he was also connected with them. I do not know what his position was.

Q. Did you have any conversation with them? A. Yes, general conversation.

Q. Can you tell us generally the subject of it? A. I told them that we were starting an inspection of the building, and that I was up there to complete the building. The rest was mere generalities, I think.

Q. Did you give them any information as to the extent of completion or as to the plans and 686
specifications governing the completion? A. Yes, I sent them a complete set of plans and specifications. That is mentioned in that letter.

Mr. Judd: I offer that letter in evidence (handing paper to Mr. Murray).

(Marked Plaintiff's Exhibit No. 106.)

Q. Were those plans and specifications sent to Mr. Switzer, at his request? A. Yes.

Q. Did he give any reason why he required a new set of plans and specifications? A. Yes, he said he had none. 687

Q. He was a representative of the surety company? A. He was employed by Keeler, Inc., who represented the surety company.

Q. After you gave Mr. Switzer the plans and specifications, did he come to the building again? A. Yes.

Q. And can you tell us what he did there? A. He started to make—to go through the building and see the condition.

688 Q. And you permitted him to examine the building, did you? A. Yes.

Q. Did you place any restrictions upon his opportunity to inspect the building? A. No. Quite to the contrary. As a matter of fact, I offered him the services of my assistant, and I remember that they did go through together.

Q. Who was your assistant? A. Mr. O'Brien.

Q. About how much time did Mr. Switzer spend in his examination of the building? A. As I recall, about in the neighborhood of a total of five days, I should say.

Q. That is, five days from nine o'clock a. m. to
689 five o'clock p. m.? A. No; that was the total time spent altogether. It may not have been a full day at certain time.

Q. And his inspection, you tell us, began some six weeks or more after your survey had begun? A. That is corect.

Q. Was your survey complete at that time? A. Yes.

Q. And had you begun to correct any of the items of omission? A. We had.

Q. Or incompletion? A. Yes, we had.

Q. Had any work been done in completion before Mr. Switzer came to the building? A.
690 Yes.

Q. Did you discuss with Mr. Switzer at all the extent of incompletion or of variations from the plans and specifications? A. Yes, I did, in general.

Q. I show you now Plaintiff's Exhibits Nos. 71 and 72 (handing witness), and ask you if you have seen the lists annexed to those letters before? A. Yes, I prepared those lists.

Q. And you made the estimates as to value or cost on various items included in those lists? A. Yes. 691

Q. Did you discuss those lists with Mr. Switzer? A. Yes.

Q. Can you tell us about the length of time after your first conversation with him you went over them with him? A. Oh, I think, about the first few days he was there.

Q. I show you now a memorandum dated June 27, 1931, and ask you if that refreshes your recollection as to the time of these discussions (handing witness)? A. Yes. It was the latter part of June. 692

Q. Do you know how much time you spent with Mr. Switzer discussing the lists contained in Plaintiff's Exhibits Nos. 71 and 72? A. It may have been a couple of days, to the best of my recollection.

Q. Did Mr. Switzer question the amount of any of the items? A. No.

Q. Did he question whether any of those items had, in fact, been omitted? A. No.

Q. You may have heard, in Mr. Murray's opening, the statement that some of the items included in Schedule B annexed to the complaint, and some of the items claimed against the surety company in this suit were entirely fictitious. Did Mr. Switzer suggest that any of the incompletions which were referred to in these lists were fictitious? A. No. 693

Q. Or that your lists had not been prepared in accordance with the plans and specifications? A. No, he did not.

Q. Did he offer to complete the job on behalf of the surety company? A. He did not.

694 Q. What did Mr. White tell you when he came there to the building? A. Mr. White told me that all the affairs in connection with this building, of the Fidelity & Deposit Company had been turned over to Keeler, Inc., with which firm Mr. Switzer was associated.

Q. Explain to us, please, the nature of the work which you did in completing this building? Did you let the contracts? A. I did; I let all the contracts, supervised the work, prepared all specifications where necessary and passed on the payments.

Q. Did you prepare a list of the work which was
695 done in completion? A. I did.

Q. Now, there has been some reference to alterations made in the first floor. Did your list include any charge in connection with these alterations? A. It did not.

The Court: That did not include, then, the modification in respect to a change of the kitchen to the first floor?

The Witness: No.

The Court: Or the elimination of partitions in those private dining rooms?

The Witness: No, nothing like that, nor
696 the marquee, nor the wood floor, or anything like that.

Q. I show you now Plaintiff's Exhibit No. 84, and ask you if you prepared that list or if it was prepared under your direction (handing witness)? A. It was.

Q. And the items of expenditure listed on there were actually spent, were they? A. They were.

Q. And the expenditures were made under your direction and supervision? A. They were.

Q. And are the amounts there shown the reasonable cost of the items listed in those schedules? 697
A. They are.

Q. Have you examined Schedule A annexed to the complaint? A. I have.

Q. Was that also prepared under your direction? A. It was.

Q. Are you familiar with the differences between Schedule A annexed to the complaint, and Plaintiff's Exhibit No. 84? A. Yes.

Q. Did you have the checks and vouchers covering each item before you when you prepared Schedule A? A. I did not.

Q. Can you tell us, in the main, what the differences are between Schedule A and this Exhibit No. 84? 698
A. When I prepared the revised schedule A there were certain additions and certain deductions made from the original schedule, because at that time we discovered certain vouchers and checks that I had not seen before.

Mr. Judd: Your Honor, with a great deal of difficulty, before defendants' counsel this morning stated his position with respect to specific items of Schedule A, we gathered together all the checks and vouchers covering those items. In order to economize time in 699
the trial, I think we can perhaps rest on the witness's statement of his preparation of Schedule A, and not introduce the vouchers, except for items as to which there is a question raised.

The Court: Or as to which the defendants seek an inspection.

Mr. Judd: Yes, they are here for him to examine.

700 Mr. Schenck: Would it be feasible for us to introduce, on the statement of the witness that each and every item upon this schedule is an item of actual competition, made under his supervision, and that the amount of expenditure is the amount stated—to introduce or to have regarded that schedule as prima facie proof of the expenditure of that amount —tendering, however, to our opponents the detailed checks and vouchers and bills in support of any item concerning which they seek to inquire?

The Court: I see no objection to that.

701 Mr. Murray: I think it is perfectly all right for Mr. Lukach to testify that he paid a certain amount of money—

The Court (Interposing): That, in substance, is what he has testified to, and if you, on cross examination or otherwise, seek to check the items in any respect, that is your privilege.

Mr. Schenck: We should have no objection, inasmuch as there is a multitude of detail here, to allowing Mr. Murray to examine into the items before he makes his cross examination, or at any rate to reexamine these

702 vouchers at any time afterward, and to recall the witness.

The Court: Very good.

Mr. Schenck: Then, it is considered that this schedule, in respect of all its items, on the testimony of this witness, constitutes a prima facie case as to the items of completion and the expenditure of the amounts on the schedule?

The Court: We will not say what it constitutes, but you offer it for whatever it is worth. 703

Mr. Schenck: Yes. I am not offering it now, because it has already been marked in evidence. I am merely reoffering it as evidence of the items therein contained.

The Court: But you do not have to reoffer it. It is in as an exhibit, and the witness now testifies or has testified with respect to the correctness of each item of expenditure.

Mr. Schenck: Yes.

Q. Will you take up now, Mr. Lukach, Plaintiff's Exhibit No. 85, headed "Schedule B, Revised" (handing witness)? Was that prepared also under your direction? A. It was. 704

Q. And Schedule B annexed to the complaint was prepared under your direction? A. It was.

Q. Did you, at the time that Schedule B annexed to the complaint was prepared, have before you all the correspondence of the Prudence Company's engineering department bearing upon waivers of any changes from the original plans and specifications? A. No, I did not.

Q. Have you examined the plans and specifications with particular reference to the items listed in Plaintiff's Exhibit No. 85? A. I have. 705

Q. And you have also examined the hotel? A. I have.

Q. And you can state that the items mentioned in Plaintiff's Exhibit No. 85 were not included in the hotel as it was when you entered into it? A. That is correct.

Q. Are you familiar with the amounts which are listed in regard to the cost or value of each item in Schedule B? A. I am.

706 Q. Do those, in your opinion, represent the reasonable cost of supplying the items mentioned, or in cases where that is questioned, the reasonable difference in cost between the materials which were installed and the materials which the plans and specifications called for? A. Yes.

Mr. Judd: We are prepared, partly through Mr. Lukach and partly through other witnesses, to substantiate in detail the reasonable value of the items in Schedule B.

The Court I do not think you will have to go forward with such proof, in the present state of the case. That may be reserved for
707 rebuttal, perhaps, if necessary.

Mr. Judd: Yes.

Mr. Schenck: We should like to reserve the right in that respect, and particularly with regard to the painting item, we are prepared to give substantiating evidence, and also with regard to each of these items, but in the interest of shortening the trial, we should prefer to reserve it for rebuttal, if your Honor will allow that?

The Court All right.

Mr. Judd: In that event, we are through
708 with the direct examination of this witness—oh, one more question.

Q. Have you certain notes there, Mr. Lukach, which you have prepared, in reference to the items in Exhibits Nos. 84 and 85 (exhibiting)? A. I have.

Mr. Judd: I think the witness should be free to use those, in the course of his cross examination.

The Court: He may, if necessary.
Mr. Judd: That is all. 709

Cross examination by Mr. Murray.

Q. Do you see in the court room now a gentleman who saw you at the building, and whom you designated as Mr. White? A. No, I do not see him here.

Q. Are you sure of the name, Mr. Lukach? A. Oh, I am quite sure of the name, yes.

Q. Now, you say you spent about from four to five weeks in the examination of this building; is that correct? A. That is correct.

Q. Does that mean that you spent all of those 710
weeks at the building, the whole of each day? A. I stayed at the building continuously. I had my office there from the first time I went there until I left.

Q. And you stayed there each day all of the day? A. Each day all of the day I was at the building.

Q. Each day you were at the building? A. Yes, that is correct.

Q. And all of each day? A. All of that day, each day.

Q. And your assistant, I understand, reported to you that he examined this, that or the other 711
room? A. That is correct.

Q. If you had not examined it yourself? A. That is correct.

Q. Now, when in March was it that you were first approached as to making an inspection of this work? A. I should say it was the last week in March.

712 Q. And at that time did you arrange to go to the building and take up your office there? A. I did.

Q. And in April did you begin your actual physical inspection? A. As I recall, it was about the first day of April.

Q. Now, just explain in detail what you would do as you entered a room in that building? A. We had a note-book with us, and we had previously refreshed our memories by looking at the plans and specifications. As we went into a room we noted down various items that were either incomplete or that had been damaged—such as
713 where plaster was cracked; whether fixtures or parts of fixtures were missing; whether any hardware was missing; whether any carpentry items had been omitted, such as shelving, clothes poles; whether glass in doors was omitted; whether the base had been broken, and so forth.

Q. And each of those omissions would be—each of those items would be written down by you as you went through your physical inspection? A. By my assistant or myself.

Q. Now, having started your inspection at the beginning of April, would you say that you had
714 completed it early in May? A. That is correct, yes.

Q. When was it that you had completed this schedule, being part of Plaintiff's Exhibit No. 71 (handing witness)? A. That schedule, as it stands now, was completed some time after the inspection was made.

Q. And how long before June 9, would you say that this schedule had been completed? A. Not very much before that time, I should say.

Q. Early in May you had completed your in- 715
spection? A. That is right.

Q. Did you immediately proceed to put it down in writing, for a report to the Prudence Company? A. I started it, but it was a very lengthy operation.

Q. And you changed your idea as respects the form of the report, did you? A. No, I did not change my idea.

Q. You say you started it, but it was a very lengthy proceeding? A. That is correct.

Q. But this is the one you mean, is it (exhibiting)? A. That is the one I mean, yes.

Q. I see. Now, when was it that you had dis- 716
covered the items represented on the schedule, being part of Plaintiff's Exhibit No. 72 (handing witness)? A. I noticed some of these articles as soon as I went to the building.

Q. And did you include those in your original report? A. Some of the items were included at the time we went through on the survey. Others were put down later.

Q. The reason I ask is this, Mr. Lukach: These items are included in a report of July 6; they are included in a letter of July 6, and these items are included in a letter of June 9, one month previously; and you had completed your inspection early 717
in May, 1931? A. That is right.

Q. Now, at the time this letter of June 9 was sent containing these items, had you knowledge of these items also (indicating)? A. I had knowledge of some of them. Others may have been found out later.

Q. Well, can you tell me what items were found out after the sending of the report of June 9 (handing witness)? A. Yes. Some of these items

718 were taken from the report of Mr. Grad. He had certain items on his report that I had not on mine.

Q. Now, you are an engineer, and I understand you made a study of the plans and specifications in order to make a complete inspection? A. That is right.

Q. And from a study of the plans and specifications you could tell whether or not, in the case of metal stools, for instance, the plans and specifications had been complied with? A. Yes.

Q. Did you discover the fact that there were metal stools and aprons on certain windows instead of wooden aprons? A. Yes, I did discover
719 that.

Q. When did you discover that? A. I noticed that quite often as I went into the building.

Q. Did you make a report of it? A. I made a note of it, yes.

Q. But you did not include it in your schedule which was made for the June 9 letter? A. No.

Q. Can you explain why you did not want to put it in that schedule? A. Yes. That schedule was the amount required to complete the building. The other schedule was the deviation from the original plans and specifications.

Q. So that you did not include in this schedule
720 any omissions or substitutions, is that right? A. I would like to recall it again by looking at it, before I say "yes" to that.

Q. (Handing paper to witness.) A. (After examining.) Yes, that is substantially correct.

Q. Well, what sort of report were you asked for, Mr. Lukach? A. I was asked for a report in two ways; the amount necessary to complete the building; and then the amount involved, because of the fact that the building was not erected in accordance with the original plans and specifications.

Q. Did you make a report to the Prudence Company at one time in which you gave both kinds of items? A. No. 721

Q. You did have the omissions and substitutions at your disposal at the time you sent along the first report, did you not? A. I don't know whether those items were complete; whether that list was completed or not at that time.

The Court: But your field work had been completed?

The Witness: Yes, the field work had been completed.

Q. Will you check on this Plaintiff's Exhibit No. 72 those items which you yourself had discovered? A. Do you want me to mark alongside of each one? 722

Q. Yes, write your initials alongside of each item which you discovered. A. (Marking papers and handing same to Mr. Murray.)

Q. Then, any other items than those initialled by you were found by Mr. Grad? A. Yes.

Q. Then, outside of the items of Keene cement, and teak and burled wall panelling, and the brick item, all the others were discovered by you? A. Yes.

Q. I notice here in this exhibit that on the hardware you mention "Hardware allowance, $50,000, Contract Rosenthal Hardware Company, $20,-500." You were then familiar at that time with the contract or the contract price? A. Yes. 723

Q. For the hardware? A. That is correct.

Q. And in the same way you were familiar with the allowance—the cash allowance provided in the original specifications for medicine cabinets, and also the contract price for the cabinets which were actually installed? A. That is correct.

724 Q. And in the same way with respect to the apartment refrigerators? A. That is correct.

Q. You will notice the estimate of Kellastone carpet strips and labor for installing, and the material, being a total of $9,975 (handing witness). Did you subsequently revise that figure? A. You made a slight error there. You said "Kellastone carpet strips and labor for installing". The labor for installing is a different item.

Q. Oh, excuse me. Yes, that is labor for installing molding? A. Yes, that is a different item.

Q. Now, upon what basis or upon what information did you base your estimate as to the value
725 or the cost of installing Kellastone carpet strips? A. By the people who install the Kellastone carpet strips. They gave us an estimate for the work.

Q. And later on did you get another estimate somewhat lower? A. More recently we had Mr. Zilber check up the quantity of Kellastone carpet strips, and his quantity was smaller than the original amount, as I recall it, and in the revised schedule we used the smaller amount.

Q. Now, on the matter of carpentry labor, I notice in here that there is $150.32 which I understand you paid for trim bills? A. That is correct.

Q. And an item in the same paragraph of
726 $985.70 for labor? A. That is right.

Q. Now, was this item of labor in connection with these trim bills? A. Not entirely, no.

Q. The trim bills represented the actual purchase or cost price of the items which were purchased, is that right? A. That is right.

Q. The $150.32? A. Yes.

Q. And did the Lockwood Manufacturing Company, or Bell Brothers, or Hasbrouck have any-

thing to do with the installation of that work? A. No, sir. 727

Q. Now, who is Finkelstein? A. Carpentry contractors.

Q. And for what work did you contract with Finkelstein? A. I had a contract with them to furnish carpenters at so much per day for all carpentry work that was required.

Q. So that you checked on the number of workmen of Finkelstein's who appeared on this job? A. I did.

Q. And this amount of $1,031.67 is the total of the bills charged for their presence at the building, is that right? A. No, it is not. 728

Q. Well, how did you arrive at that $1,031.67? A. The total of the Finkelstein bills was greater than the amount there, because they did other work which was not chargeable to completion.

Q. And what was that work? A. Alteration work which we did in general throughout the building.

Q. How did you allocate to this particular work this sum of $1,031.67? A. We kept a daily record —a daily time book, and marked into it the carpenters who were employed on the completion work. There is one other thing that I want to tell you, that you have in the back of your mind, 729 I think: that in addition to the carpenters putting on the trim, for which the bills are mentioned, they also put on a lot of hardware. Those hardware bills are not in the carpentry item.

Q. That is what I wanted to find out. A. Yes, I thought you had that in mind.

Q. The difference between $152 worth of material— A. (Interposing.) Yes.

730 Q. (Continuing)—and $1,031 of carpentry labor— A. Yes. You will see a substantial hardware bill there.

Q. So that really you did check, in allocating in part Finkelstein's bill to this particular item—you did check the amount of time spent by the carpenters in doing those items which are covered in Schedules A and B? A. That is correct.

Q. What was the total amount of the bill that Finkelstein charged—the total bill charged by Finkelstein for carpentry labor? A. I am not prepared to state that offhand. I haven't got the exact figures, but it was considerably more than
731 that.

Q. Do you know how long these laborers were on the building or at the building? A. Which laborers?

Q. Finkelstein's laborers? A. Yes.

Q. How long were they at the building? A. We had some carpenters up to the time practically when I left—the whole time I was there.

Q. Was there any time in particular when there was a larger number of carpenter laborers there than at any other time? A. Yes.

Q. And what was that period? A. That was the period when we were cutting down the kalamein
732 doors in order to make room for wood floors, which were installed.

Q. Now, Mr. Lukach, I would like to have you describe just what the nature of the alteration, if any, was which was made in the lower floors? A. I have a plan with me, if you would like to see it, of that alteration, or I can tell you in detail: the main kitchen was taken from the basement and put on the ground floor, in the general location where the private dining rooms were

originally shown. In addition to that, the large 733
dining room to the right of the main entrance on 59th Street, was converted into a separate banquet quarters. We had a separate entrance, from the Central Park side, directly in there, and partitioned that off from the rest of the lobby. Another large item was the installation of wood floors in approximately 60 per cent. of the building. Another item was the installation of the marquee over the main entrance; and the last of the other items was the furnishing and installing of gas ranges in all the serving pantries. I think that covers the larger items of alteration.

Q. Serving pantries? A. Yes, they are called 734
"serving pantries"—small rooms connected with each apartment wherein there is a sink, and a little refrigerator and other equipment for some light cooking. They are called "serving pantries".

Q. Was that installation of additional refrigeration? A. No; I said "gas ranges". There were no gas refrigerators.

Q. Oh, I beg your pardon. Was this erected as a non-housekeeping hotel? A. I am quite sure it must have been.

The Court: The law was changed after a 735
while—

The Witness (Interposing.): Yes, I was just going to say that.

The Court: Was there not some state legislation with respect to tenement house violations filed against a number of hotels in New York, preventing cooking in small apartments? I think there was some legislation with respect to those structures.

The Witness: Yes. This was the first hotel able to take advantage of that change.

736 Q. I see. A. And put in gas ranges; and of course we immediately did that.

Q. Now, how long did the doing of this different work which you have described, take, Mr. Lukach? A. Oh, I should say it took approximately four months on and off.

Q. That is, the changing of the kitchen, and the rearrangement or installation of gas ranges in the serving pantries? A. Yes.

Q. As you call them? A. Yes.

Q. Now, may I see the plan to which you referred a second ago? A. Yes, certainly (handing blue print to Mr. Murray).

737 Mr. Murray: I offer this plan in evidence, your Honor.

(Blue print marked Defendants' Exhibit H.)

Q. Now, will you hold that for a moment, this Defendants' Exhibit H (handing witness)? A. Yes.

Q. And I will ask you to refer to it: Now, did this work which is shown on this plan obviate the necessity of putting in any bronze screens at all or certain bronze screens? A. Certain rooms that
738 were shown on the original plan were no longer there.

Q. And do you know where the bronze screens were supposed to have been placed which under Schedule B were omitted from the lobby floor? A. Yes, sir; I know where they were supposed to be.

Q. Is there a place on this plan where these particular bronze screens could be put in?

Mr. Schenck: I think we should object to this, your Honor. It has nothing to do with our case.

The Court: I do not see that it has. If they afterwards when they get possession decide they want to change around their building, that does not mean that the owner is relieved of his obligation under the contract. 739

Mr. Murray: No, your Honor, but on the question of damage if they were going to rearrange the lower floor so that probably the bronze screens, if they had been installed, would be taken out I cannot see where any damage has been sustained.

The Court: No, but the item of damage they would be able to prove though they did not have to do anything to the building. Even though they did nothing to the building they would still be able to prove the damage. 740

Mr. Murray: I wish to state my position, then, at this time, your Honor. So far as the damages for omission are concerned. That is this: They are entitled to recover for omissions which they have not put in only in the event that those omissions have so decreased the value of the building as to lessen the security which the building was supposed to represent, and in the absence of their actually paying money for the insertion of those omissions they have not sustained any damage. 741

The Court: I do not think that follows at all. They might have remodeled the entire structure. They might have in the exercise of their business judgment as owners. Not as mortgagees, but as owners they might have decided it would be a more profitable enterprise to them to remodel the entire structure

742 and use it for another purpose, if that were feasible. That does not bear upon the question of the damages which they as mortgagees sustained. After all, this is a law action, this is not a matter of equity.

Mr. Murray: Exactly, it is a law action, and the material question is what damage has been sustained by the plaintiff. Now I claim that no damage has been sustained if as a matter of fact they have received a building which is as valuable as the building would have been without the omissions, as long as they have not spent any money in going into
743 the building.

The Court: I think that really carries us into the realm of speculation. I shall sustain the objection.

Mr. Murray: Exception.

The Court: You can see how untenable your position is if you reflect for a minute on the matter of expenditure involved in the reconstruction of this basement and upper floor. It involves much more than the omission of these few bronze screens.

Mr. Murray: Oh, yes, it includes more
744 than that, certainly.

The Court: I could conceive that if the object of the reconstruction was to offer some substitution for the bronze screens, you might have an arguable point, although I am not prepared to admit even that. But this was not by way of substitution at all; this was a totally different thing. You cannot argue their damage is obliterated by reason of this tremendous expense they incurred in seeking a wholly different objective.

Discussion

Mr. Murray: Of course, if on the lobby floor on the original plan, your Honor, there had been a provision for bronze screens on either side of the doorway and the bronze screens had not been put in, and then they alter the ground floor so that there was not this doorway which would require bronze screens, I say that they have not sustained any damage at all by reason of the absence of these bronze screens which they would have removed anyway. 745

The Court: No, but what they did afterwards was not done as mortgagee at all. It was done as owner. 746

Mr. Schenck: Quite possibly on Mr. Murray's theory we might be entitled to the cost of these alterations. It might have been the absence of these bronze doors—

The Court: I have pointed out to him that there was a vast expense entailed which as a matter of incident merely and not of design avoided the necessity of the installation of some of these screens. Well, I have ruled in the matter, and I was just talking aloud for the moment.

Mr. Schenck: I offer now the admission in the answer of the defendants which I referred to at the beginning of the trial. 747

I offer in evidence Paragraph 12 of the present answer of the defendants, which alleges as a part of its first separate complete and distinct defense:

"Twelfth: That on the 5th day of December, 1930, the building was in such condition that it would have required a sum in

748 excess of $170,000 to complete the same and make it ready for occupancy, and there were omissions of labor and materials from and substitutions of inferior materials in said building amounting in value to a sum in excess of $230,000."

I also offer in evidence a paragraph of the original amended answer which was stricken out by the Court, and I am offering this solely as an admission. It is the twentieth paragraph of the second separate and distinct defense, which reads as follows:

749 "Twentieth: That on the 5th day of December, 1930, the value of labor and materials still remaining to be installed and incorporated in the construction of the building was in excess of the sum of $400,000."

This answer being verified on the 2nd day of March, 1933, by Andrew G. Schneider, the assistant secretary of the Fidelity and Deposit Company of Maryland. I ask your Honor to consider these admissions in the light of the evidence of the case that the rep-
750 resentatives of the defendants were given full opportunity to—

The Court: Such parts of the answer or amended answer as you have read will be received as exhibits in the case.

Mr. Murray: That brings up a question which I had intended to bring up before that, your Honor, and that was to amend my first separate and complete defense in the answer. May I then make this motion, your Honor.

Discussion

That the first separate, distinct and complete defense be amended to read as follows: 751

"Eleventh: That the building loan agreement entered into between the plaintiff and Central Park Properties, Inc., provided that the building to be erected by Central Park Properties, Inc., should be completed and ready for occupancy no later than December 16, 1930; that the alleged items of incompletion claimed by the plaintiff, totalling a sum approximately $170,000, and the alleged omissions of labor and materials from and substitutions of inferior materials 752 in said building, amounting in value to a sum in excess of $230,000, as alleged by the plaintiff, were known to the plaintiff on the 5th day of December, 1930, and that although the plaintiff had knowledge thereof the plaintiff advanced the Central Park Properties on the said 5th day of December, 1930, all of the monies which it had agreed to advance under said building loan agreement, although the plaintiff knew that the Central Park Properties, Inc., would be unable to complete the building in accordance with the terms of its contract, and that 753 it would necessarily default in the performance of its contract, and that the payment by the plaintiff, therefore, of the said sum of $300,000 on the 5th day of December, 1930, was made in bad faith and in absolute disregard of the rights of the defendants, and that by reason thereof the liability of the defendants under their bond was released and discharged."

754 The Court: Is that part of your first affirmative defense?

Mr. Murray: The first affirmative defense.

The Court: What have you to say about that?

Mr. Schenck: I should prefer to have Mr. Murray tender such a proposed affirmative defense verified by the defendant. We have taken a large amount of evidence both in regard to the state of the building examined by both sides in the latter part of the spring of 1931. We have also introduced some evidence as to the lack of knowledge on the part of the
755 plaintiff of that situation on the 5th of December, 1931. I do not see how the defendants can take the responsibility of asserting that the plaintiff knew as a fact items of omission and incompletion and divergence on the 5th of December, 1930, without also taking the responsibility of stating that as a fact. Knowledge of a fact cannot be independent of the fact itself. If they will assert as a fact a verified pleading that that was the situation on December 5, 1930, I do not think I should object to its being interposed.

756 The Court: On that condition you may amend your answer.

Mr. Murray: I shall prepare, then, an amendment.

The Court: You can simplify it, Mr. Murray, by preparing not an amended answer, but an amendment to the answer.

Mr. Murray: That is what I had in mind, an amendment to the answer.

Mr. Schenck: Yes.

The Court: Let it be verified. 757

Mr. Murray: If your Honor please, I now move to amend the first separate defense by filing this separate defense in its stead (handing paper to Court)..

Mr. Schenck: I object to this proposed amendment at the present time, your Honor, on the ground, first, that it does not comply with the conditions stated at the end of yesterday's session. There is no assertion of fact whatsoever—

The Court (Interposing): Well, I did not impose that condition. That was one that you urged, and I did not—at least, I did not 758 want to be understood as saying that it was only on that condition that I would permit the amendment to be filed.

Mr. Schenck: Then, I misunderstood your Honor in that respect. This affirmative defense does not allege any basic fact; it does not allege what the situation was on the 5th of December. It alleges that whatever that situation may have been, we knew as much about it then as we know about it now; and that a payment was made—a payment with that knowledge was made in bad faith. That, 759 of course, begs the question as to what the situation actually was; and they have alleged our knowledge, not as in the first form; they have made a very substantial change, so far as their assertion of fact is concerned. In the twelfth paragraph of the answer before the amendment, they say that on the 5th of December, 1930, the building was in such a condition that it would have required a sum in excess of $170,000 to complete the same

760 and make it ready for occupancy, and that there were omissions of labor and materials from and substitutions of inferior materials in said building, amounting in value to a sum in excess of $230,000.

Now, they have made admissions of record in this case in detail on that subject, and an analysis of them throws quite a light upon their present proposed amendment:

They have admitted a total amount of items of incompletion of $109,000, of which total, however, $77,000—and I am speaking very generally—$77,000 are what might be called
761 "running" charges involved in completion—electricity, insurance—

The Court (Interposing): Are you speaking now of the admissions at the trial yesterday?

Mr. Schenck: Yes, sir.

The Court: Those admissions made by counsel with respect to the items on Schedules A and B?

Mr. Schenck: Yes.

The Court: Well, do not forget that those are not one hundred per cent admissions. As
762 I understood, most of them were admissions as to the fact, but not as to the necessity for the performance of the work.

Mr. Schenck: I have eliminated, in my analysis, all admissions that have been in any way qualified. For instance, in the figure that I just gave, of $109,000, the admission goes to the fact of the item, and also to the reasonableness of the item.

The Court: Yes.

Mr. Schenck: Wherever there has been a denial, I have— 763

The Court (Interposing): But does it go to the necessity for the performance of the work?

Mr. Schenck: Well, in regard to Schedule A, it goes to an admission of the incompletion of that particular item. I am merely pointing out that there is a difference of $77,000 between the two sets of allegations, which involve an admission of—well, they allege in their first affirmative defense that it would have required a sum in excess of $170,000 to complete the same; and then they admit, as a 764 matter of record, according to my construction of their admissions as to Schedule A, that it would have taken an amount of approximately $109,000 to complete the incomplete items, taking into consideration this $70,000 of admitted running charges.

They also admit in Schedule B, as a matter of record—and here also I have excluded in my analysis all items concerning which there is any denial—they have admitted items of incompletion to the value of $60,000.

Now, I think where they are seeking to 765 plead, after we have placed upon the stand Mr. Braislin, who has been subjected to cross examination with regard to the reasons he made these advances, and who has testified with regard to the knowledge that he had when he made those advances—and now for them to seek to change that issue, and at the same time not to take the responsibility of asserting what the fact was, after all of this evidence has gone in, and after all this in-

766 vestigation, makes their amendment insufficient in law, and also it does not change the issue. It is purely a plea to your Honor's discretion, under very unusual circumstances. There is no necessity for the amendment.

The Court: Well, it is one thing to argue that there is no necessity for the amendment; but to argue that you are in any respect disadvantaged as result of it, is another thing. I think we are not momentarily concerned with the form. As to the latter, I do not see that your proof is any way disturbed by this.

Mr. Schenck Oh, I do not claim prejudice.

767 If your Honor grants this amendment, I state now that I claim no prejudice from the granting of it; and I realize that it is an appeal to your Honor's discretion. I am merely urging that they have shown no reason for the amendment, and that they are attempting to assert a charge of fraud without taking the responsibility of asserting the basic fact.

The Court: I think the more important aspect is the sufficiency of that; but as I am disposed to give every leeway here, accordingly I shall allow the amendment, and you may note an exception.

768 Mr. Schenck: No; I shall take no exception. Now, will your Honor entertain a motion to dismiss this amended answer—and I shall not argue it at any length—on the ground that it is insufficient in law, because the basic facts of the situation of the building on the date which they have selected, the 5th of December, 1930, are not stated.

The Court: Let me understand: Was not the sufficiency of that defense considered by

Judge Bondy on the motion that was made before him? 769

Mr. Schenck: Not of a defense in this form.

The Court: Well, whether in this form or not, was it in substance?

Mr. Schenck: No, not in substance. The course of the amendment—and that is rather an emphasis of this situation—the great time of the court that has been involved in motions with regard to the pleadings in this case—and the form of the defense as originally urged was a specific allegation that on the 5th of December, 1930, the building would have required $170,000 to complete, and there were items of divergence and substitution of materials in the value of $230,000, and that we knew that situation at the time we made the final advance, and that therefore they were not liable. Judge Bondy held that that assertion of precise fact, plus an assertion of our knowledge of the precise fact, did not make a good defense in law; but that with additional elements added to those allegations, bad faith might be a conclusion that could be based upon them; and then they alleged that bad faith. Now, they have persisted in the allegations of bad faith, but they are entirely the two basic allegations of the defense; so that all that they have now is a begging of the question of what we knew, a begging of the question of what the situation was, and a conclusion of law that we acted in fraud. 770 771

Now, that is a fundamental change in two particulars, and we think that the fraud charge is not sufficiently pleased.

772 Mr. Murray: May I say a few words, your Honor?

The Court: Yes.

Mr. Murray: I think Mr. Schenck is being a little overtechnical. When they served their complaint alleging all these items of incompletion, omissions and substitutions, the allegations were denied. We denied that there were all of these omissions and so forth. In a separate defense, upon information and belief, which was based upon their own allegations in their complaint—that was the "information and belief"—on their own allega-
773 tions, we claimed that they had knowledge of these very omissions at the time that they made their final payment, and that when they made that final payment, with knowledge of those omissions, and with the intention of thereafter claiming against these defendants, that they were not acting in good faith in making a final payment of $300,000.

Now, substantially this defense as now pleaded is just the same as that other one was, except that Mr. Schenck has taken advantage of an admission in a separate de-
774 fense, based upon the allegations of his own complaint, as a fact proving his cause of action.

Now, as matter of fact, their own proof has shown that the items of incompletion are practically the same as what Mr. Billsborrow said. They now reduce their items of omissions far below what they were originally, as alleged. He would like us now still to be bound by the statement that there were omissions in those amounts, when they themselves

now do not claim those amounts; and because 775
of their change of position in their claim, whereby they do not now claim that there were $166,000 of items incomplete, and $230,000 of items of omissions, we want to amend our answer so as not to be bound by admissions which were based on statements which were based upon their own original allegations.

The Court: Well, we are not really arguing that matter now. The so-called "admissions" of your answer have been received in evidence—

Mr. Murray: Exactly. 776

The Court (Continuing): —as evidence for what they are worth; but the point made now is as to the sufficiency of your alleged affirmative defense. That is the question, but you do not include that point now.

Mr. Murray: I claim that this final advance was made on December 5, 1930, of $300,000. They knew that under the terms of their contract that building had to be completed on December 16, 1930. They knew what their inspectors knew as to the state of the building at that time, on December 5, 1930. They 777
knew that if their inspetors' report was correct that building never could have been erected on December 16, 1930, that there must necessarily have been a default. Their own proof here would show that those items could not be completed in eleven days. We propose to show that The Prudence Company knew that the Central Park Properties was in financial difficulties at the time that $300,000 payment was made; that they had defaulted

778 in payments to contractors; that they knew of that financial condition of the Central Park Properties, knew that there was going to be a default on December 16th and yet without any regard whatever for the surety companies made the final payment of $300,000.

The Court: Yes, and from that you spell fraud?

Mr. Murray: Exactly.

The Court: As I said when you made that statement, as a preliminary statement at the opening of the trial, your difficulty arises out of what may be an onerous contract, and what

779 you are really seeking here is not to support a charge of fraud, as I now view the matter, but what you would like to have is a modification of the contract, or you think it is an inequitable and unfair contract. That power which is recited in both the building agreement and the bond which is the subject of this suit gives this mortgagee a tremendous power, and so long as he keeps within the limit of his performance and fulfils his obligations under both those contracts it does not, it seems to me, lie now in your mouth to spell fraud out of what in fact may be only an in-

780 equitable contract or a contract that was perhaps unwise. Coming at this stage, speaking now of the bond, all the conditions being performed by the people who obtained your bond, and you having received your full premium, and it being an executed instrument, it is too late to have that performed.

Mr. Murray: I am not seeking any reformation, your Honor.

The Court: I know you are not. You are not in form seeking a reformation of that con-

tract, but in actual fact what you are asking me to spell out of the circumstances is that this was an inequitable contract and that the plaintiff here should not have been content to abide by the clauses of the contract but should have done something more. Not that the legal requirements indicate it, but that the moral or equitable requirements spell it out. Isn't that really what you are seeking? 781

Mr. Murray: No, your Honor. First answering on the question of fraud, of course there may be fraud without any moral turpitude attached to it—fraud in law.

The Court: You mean a constructive fraud. 782

Mr. Murray: The fact that a payment was made in bad faith does not carry with it an implication that they were morally wrong in doing this thing. As to your other question, the binding status of these provisions, in Paragraph Fifth of our bond it is provided: "In the event a conflict at any time exists between the provisions of the building loan agreement and the plans and specifications, the plans and specifications shall control as to any such conflicting item or items."

The building loan agreement assumes to state that this, that and the other thing shall be approved in writing by the lender. In the very specifications upon which this contract was based, the general conditions, we have this paragraph: "Article 15. Changes in the Work. The owner without invalidating the contract may order extra work or make changes by altering, adding to or deducting from the work, the contract sum being adjusted accordingly." 783

784 The Court: That must be on written consent. That must be on some writing.

Mr. Murray: No, the owner is given absolute discretion.

Mr. Schenck: Oh, no. Written authority of the owner, countersigned by the architect. It is that same clause that you just read.

The Court: What is there said about that, this clause about written authority?

Mr. Murray: The written authority provision is contained in the building loan agreement.

Mr. Schenck: No, in the specifications. The
785 very article that you read. No extra work or change unless a written order from owner, countersigned by architect, or a written order from the architect. Article 15, page 4 of the specifications.

Mr. Murray: "In pursuance of a written order from the owner signed or countersigned by the architect, or a written order from the architect." In other words, the architect might order changes in the work, or the owner might order changes in the work, and here we say that the owner ordered changes in this work. I grant you, your Honor, that
786 this borrower could not in any event make such changes in the work to be done that he was going to construct a building there not contemplated by the parties and which was going to be no sufficient security for the lender's money. But otherwise if he did build a building in substantial accordance with the plans and specifications, and either as good in quality or better, that the lender could have no claim for damages in the event of a foreclosure. We claim that that is exactly what

has happened here—that the owner did in many instances order additional work not provided by the plans and specifications; in certain instances he altered the work to take out this, that and the other thing, but in the final analysis the question is whether the omissions, as I will call them, are less than the additions, and in the final analysis have they a building there which is just as good as was contemplated by the original plans and specifications? I say that under the provisions, the general conditions, of the specifications the owner did have the right to change, and that because it did change does not ipso facto give The Prudence Company a claim. If it changed so that it decreased the value of the property, taking into consideration all the changes, then The Prudence Company has a claim. 787 788

The Court: I am afraid you may be right about that, but it would seem to me that that means we would have to read something into the contract which I do not find there.

Mr. Schenck: The bond is specific against anything except written waivers, and it is the bond we are suing on. Of course, this argument of Mr. Murray has nothing to do with this defense of fraud. 789

The Court: No, I know.

Mr. Schenck: Of course, I do not want to argue during the course of the trial.

The Court: No, frankly this is not the moment for continued argument on this point. I shall deny your motion to strike out this amendment.

Mr. Schenck: I think I should just for the purpose of the record take an exception.

790 Mr. Murray: May we have the amended answer marked as an exhibit, or filed with the papers?

The Court: Filed with the papers.

ARTHUR S. LUKACH, resumes the stand.

Cross examination continued by Mr. Murray.

Q. Are you familiar, Mr. Lukach, with the different items listed in these several instruments, without having something before you for a reference? A. I think so. In general I am.

791 Q. Item 5 of Schedule A has to do with the elevators, the Otis Elevator Company. Do you know when that work was completed? A. It was approximately, I should say, somewhere in the months of—in the latter part of May, or June, is the best of my recollection.

Q. Do you know when the work was started? A. It was started very shortly after the contract was signed, whatever the date is on the contract.

Q. I show you some papers that Mr. Williams was good enough to hand me (handing witness), and ask you whether that would refresh your recollection as to when the contract was made? A. I

792 should say from these the latter part of May.

Q. When you originally inspected the elevator work prior to getting in touch with the Otis Elevator Company what did you find the status was? A. Why, when I first came there the first item that impressed me was that some of the elevator pits were full of water, one car as I remember was running, the signal equipment had not been completed, and in general the final overhauling and

inspection of the control boards and overhead ma- 793
chinery and motors had not been completed.

Q. Wasn't the situation such that the elevator equipment was all in but that what was required was a final inspection and final oiling up and final preparation for operation? A. I imagine that the majority of the equipment was in.

Q. Do you recall any particular items of equipment which were not in? A. Yes.

Q. What? A. The chain connecting the driving mechanism which actuated the signal control. I know that was not in, definitely.

Q. When did you first get in touch with Otis Elevator regarding the completion of this work? 794
A. Some time in May.

Q. Not earlier? A. I cannot recall.

Q. And wasn't there some refusal on the part of the Otis Elevator Company to proceed to do any work unless they were paid some part of the sum still owing to them? A. That is correct.

Q. And wasn't the amount which they required to be paid $14,500? A. That is right.

Q. And is that the $14,500 which is stated in Item 5, subdivision (a)? A. If it is stated there, it is so. I have not got that.

Q. It states here: "Elevators. To Otis Ele- 795
vator Company for: finishing work according to original contract with Central Park Properties, Inc., $14,500." A. That is correct.

Q. In other words, that was a payment to the Otis Elevator Company for work which they had already done but for which the Central Park Properties had not paid them under their contract? A. No, that is not quite right. It is not for work already done, because they did work under that contract for $14,500.

796 Q. But some part of that was on the past due payments; isn't that right? A. That I am not prepared to state. It all depends on the way the Otis Elevator Company figured the job.

Q. Isn't it a fact that the Otis Elevator Company told you that they were not interested in coming in there and doing any further work until they had been paid some part of what was already owing to them? A. That is right.

Q. And don't you know that at that time the Otis Elevator Company was claiming against the Central Park Properties Company the balance of their contract price? A. In what amount was that?

797 Q. Some $80,000. A. No, I did not know that figure until much after that time.

Q. You did learn it subsequently; is that right? A. Quite recently, yes.

Q. So that part of this $14,500 at least was a payment to Otis Elevator Company on their contract with Central Park Properties before they even went in there to finish what was necessary? A. I assume that part of it was.

Q. Don't you know what part of it was? A. No, I say I assume, because I feel that the work they did, did not amount to $14,500.

798 Q. With whom were the negotiations had? A. A representative of the Otis Elevator Company. I have forgotten the gentleman's name at this time.

Q. Did you have the negotiations yourself, Mr. Lukach? A. I had the negotiations with the Otis representative.

Q. And no one else for The Prudence Company? A. No one else for The Prudence Company.

Q. Did you discuss with The Prudence Company the advisability of paying to Otis Elevator some of this past claim which they were making for the breach by Central Park Properties Company? A. I do not recall that I discussed that. 799

Q. So that the $14,500 which is mentioned in this item is not for incomplete work entirely? A. It was the amount expended necessary to complete the job. The job could not have been completed without that expenditure.

Q. I will repeat the question, Mr. Lukach. $14,500 was not really the value of labor for completing the job, was it? A. No.

Q. Now do you know how much of that $14,500 is equitably to be allocated to actual work performed, and what part of it is to be allocated to payment to Otis Elevator on claimed indebtedness of Central Park Properties? A. I cannot allocate it. 800

Q. I show you an agreement dated the 27th day of April, 1931, between 58-59 Realty Corporation and Landsmann Bros. and Soffin, and ask you whether you recognize that instrument (handing witness)? A. I do.

Mr. Murray: I offer it in evidence.

(Painting contract marked Defendants' Exhibit I.) 801

Q. In Schedule A there is an item of $72,882 under painting. Is it from this Defendants' Exhibit I that that amount is made up? A. Yes.

Q. Before entering into this contract, Mr. Lukach, you had asked for bids from different painting contractors, had you not? A. I did.

Q. When were those bids sent out, approximately—or when were these requests for bids sent

802 out? A. I can refer to my notes and tell you exactly, but I should say approximately the requests for bids went out some time in April.

Q. This contract is dated April 27th? A. Yes.

Q. Would you say it was some two or three weeks before the making of this contract? A. I should say yes, that is right.

Q. And did you get bids from other contractors? A. I did.

Q. And among the people from whom you requested bids were the original painting contractors on this job; isn't that so? A. That is correct.

803 Q. And when you sent out your requests for bids you sent out some sort of statement of what you wanted done and alternates? A. That is correct.

Q. Were there alternates? A. Yes.

Q. Have you got the copy of the request for bids which you sent out at that time? A. I think I have a copy of a letter. With that letter there is a specification on which they figured.

Q. May I see that letter, Mr. Lukach, if you can put your hands on it readily? A. It may be in the painting folder; I am not sure.

(Mr. Judd hands witness papers.)

804 Q. Well, unless you can put your hands on it readily, Mr. Lukach, we won't delay at this time. A. It is here somewhere. I can get it afterward.

Q. Probably somebody else may be able to find it for you. Now prior to sending out these requests for bids you had made your detailed inspection of the building? A. That is right.

Q. And determined what the condition of the painting was at that time? A. That is correct.

Q. When had you started your investigation or inspection? When did you first see the painting which was then on the walls? A. As soon as I went into the building for the first time I noticed it. 805

Q. And that was on or about April 1st? A. That was on or about April 1st.

Q. Did you find painting in every room in the building where painting had been required by the original specification? A. As I recall it there were some rooms were omitted. In most of them the painting had been started.

Q. Could you tell by your inspection how many coats of paint had been put on? A. Yes. 806

Q. And where paint had been put on in these different rooms would you say that all of the coats had been put on except the final coat? A. Two coats had been applied, a sizing coat and then the second coat.

Q. And under the specifications how many coats were required? A. As I recall it three were required on the walls.

Q. Two had been applied and one remained to be applied; is that right? A. That is right.

Q. In examining this painting job, Mr. Lukach, what would you say would have been the reasonable cost of applying the final coat of paint? A. I am not prepared to state that. 807

Q. You have a fair idea of the amount of space which would have been required to be painted? A. I know the size of the hotel and the number of rooms.

Q. What basis did you use to determine whether the ultimate bids which you received were satisfactory or not, as regards price? A. The estimates which I obtained and my own experience.

808 Q. In your experience haven't you arrived at any conclusion as to what it might cost to put a final coat of paint on a building? A. Well, this job is a little—is quite different from the ordinary painting jobs that you run across. If you take a new building you know approximately how much it is worth to finish that room, but when you have a building that has been started, and particularly when the paint was of an inferior quality which would require a lot of patching and sparkling, as they say, it is almost impossible, outside of a painter, to judge that, and then he would have to go into it very carefully.

809 Q. Then do you say the paint was of an inferior quality? A. I do.

Q. Do you say that it did not comply with the specifications? A. I do.

Q. In what respect? A. In the first and most important respect there was insufficient sparkling, and perhaps I better tell you what "sparkling" is, and for the Judge, so he will know. When there are rough parts of the plaster, if there are any little concave sections they have to be filled in with a preparation called sparkling, which is very like plaster of Paris. If there are any parts stick out from the wall they have to be sand-
810 papered down, and all those filled with sparkling, and they have to be touched with shellac so as not to have that absorb into the plaster of Paris. That takes time, and I noticed particualrly here there were a number of places where it had not been done.

Q. When you made your inspection of the painting job which was then done, that part of it which was done, you knew then whether or not the materials were defective or not in accordance with

the specifications, didn't you? A. That is right, yes. 811

Q. Yet you made a request upon the original contracting painter to submit a bid, did you not? A. I did.

Q. Did you think that the work which you saw there in the building had not been properly done? A. I did.

Q. And yet you asked the same contractor who had done that work to make a bid for the new work? A. I did.

Q. When you requested bids for the painting did you request specifically a bid for the completion of the painting incomplete, using the other paint 812 that was on there as a basis? A. Naturally. We could not take the paint off the walls when it was there.

Q. If a contract requires the placing of three coats of paint on a building, Mr. Lukach, and two coats have been placed thereon, what would you say the proportion of the work is that had been done? A. I am sorry, I will have to beg that question, because there was another factor entering into it which has to be spoken of before I can answer that completely.

Q. What is that factor? A. The fact that be- 813 cause of two reasons two coats were necessary instead of the one originally specified, and the two reasons for that are because we had sparkling again, and in sparkling all those sparkling spots would stick out, and one coat would not cover; and the second is that the building had stood so long that the original painter and also the one who finally got the job—it had lost its tackiness, a slight stickiness, and it would not hold the final coat. Those were the reasons.

814 Q. What causes that condition of tackiness, Mr. Lukach? A. The fact that the paint had dried and hardened standing exposed without the final coat.

Q. It is very often the case, is it not, that the original coats of paint may stand without being painted over for months and months? A. No, not to my knowledge. That is the exception rather than the rule. In the ordinary course of painting one coat usually follow the other after it is dried.

Q. Don't you know it is the fact in New York City, in the erection of apartment hotels and apartment houses, that the last coat of paint is
815 reserved for the time when the tenant picks it out? A. In my own experience that has not been the case. We have always completely painted the buildings.

Q. Do you know whether that practice is followed at all in New York, that I mentioned? A. It may be followed by others, but I am not prepared to state because I do not know from my own experience.

Q. You say it is not followed by Bing & Bing? A. It is not followed by my own experience, and I do not know what others have done.

816 Q. Do you say you know of no case where the final coat of paint has been reserved for the time when the tenant comes in? A. The only case I know is the Essex House.

Q. Do you say it would make any difference so far as this question of tackiness is concerned whether the building were tenanted or not? A. I don't think that would, no.

Q. The very fact that the building is not tenanted would have nothing to do with the tackiness feature of this paint? A. No.

Q. In your estimation how long will the basic two coats of paint remain sufficiently tacky before the final coat is put on? A. I should say approximately six weeks. Somewhere in that neighborhood. Two months. 817

Q. If necessary will you examine this contract and tell us just what work was done under it (handing witness)? A. What work was done under the contract?

Q. Yes. A. There are two specifications attached to this contract. One is the original Grad painting specification and the other is the one I drew myself.

Q. The one which you drew yourself is entirely separate and distinct? A. That is correct. 818

Q. And additional to the Grad specification? A. That is right.

Q. And that specification was drawn with your previous knowledge of what you considered a good painting job? A. That is right.

Q. Why was there any necessity of using the Grad specification at all? A. Because I had in mind that there might be some legal trouble with the bonding companies.

Q. Who told you that, Mr. Lukach? A. I think I discussed it with one of the officers of Bing & Bing. 819

Q. And Bing & Bing knew that there was a surety company interested here? A. I imagine they did know.

Q. Just what was the result, then, of using the Grad specification at all in the contract? A. It was necessary to have the Grad specification part of the contract in order to arrive at the price.

Q. With the Grad specification in there was there a price based upon the Grad specification? A. Yes.

820 Q. Different from the other price? A. Yes.

Q. What was the price based upon the Grad specification? A. $90,800. That was the Grad specification plus the additional coat of flat wall paint that I mentioned, on the living room walls, chamber walls and other places, plus two coats of cement floor paint in all closets, stair halls, stair treads and platforms, servants' rooms and servants' corridor on second floor, office room on mezzanine floor, all cellar floors and all machine and elevator rooms throughout the building, all as proper and necessary in a building of this character.

821 Q. Where do you get the figure $90,800 on the Grad specifications? A. My original estimates and bids were based on the specification which I sent out. After getting the lowest possible price from the contractor I thought suitable, I then asked him to submit a price based on the Grad specification. That is the way I obtained the $90,800.

Q. Was there included on that bid or this figure of $90,800 any consideration for work already done? A. Yes, of course.

Q. Maybe I can get it another way. When you asked for the bid on the Grad specification did
822 you simply ask for a bid on that specification regardless of what had been done before? A. No, I asked for it to complete the work according to the Grad specification.

Q. To complete the work? A. Yes.

Q. So that to complete the work under the Grad specification it would have cost $90,800? A. That is correct.

Q. But you actually did practically a new job for $72,000; is that right? A. No, it was not a

practically new job. It was just finishing up in addition to the work that had been done. 823

Q. Well, wasn't the bid on the Grad specification to finish up on the work already done? A. That is correct.

Q. And that was, you say, $90,800? A. I do.

Q. What was done was to finish up on the work already done? A. Yes, but not according to the Grad specification. According to my own, which differed materially.

Q. And do you say that the material which you used was not as good as— A. No, I do not say the material; but there were certain things in the Grad specification which I thought would be foolish to go through with, because of economic reasons, and my specification was a much more economical one. 824

Q. Do you say that there is a good job there now? A. As good a job?

Q. Do you say there is a good job there now? A. I say there is a good job there now; yes, sir.

Q. In spending $72,000 for painting, was there any part of the previous painting made use of? A. Yes.

Q. What part of it was made use of? A. Ceilings that were calcimined properly, and the two coats of paint on the wall, and the one coat of paint on the trim. 825

Q. The paint on the trim was all right in your estimation? A. In my estimation it could have been a little thicker paint.

Q. But it was sufficient for the purpose; is that it? A. Sufficient for the one coat that was there. There was one big difference, Mr. Murray, in the specifications that would account for a large part of this difference in the contracts. If you are interested I will tell you.

826 Q. I am very much interested. A. Mr. Grad called for three coats of paint on the ceilings, and my specification called for calcimining. Three coats of paint is very expensive. That makes for an excellent job.

Q. When you examined the building, the rooms, you found molding on the walls, did you not? A. I did.

Q. And where was this molding—in how many of the rooms? A. As I recall, the majority had panel molding on the walls.

Q. The majority of the living rooms and bedrooms? A. Yes.

827 Q. And the servants' rooms? A. No, not the servants' rooms.

Q. But all the living quarters had molding around the walls? A. That is right.

Q. Was that molding removed? A. Yes, it was.

Q. And who performed the labor of removing all this molding? A. The carpenters.

Q. There is not included any carpentry bill in Schedule A, which we have previously discussed —any charge for the removal of that molding? A. No, there is not.

Q. Now, didn't the removal of the molding from the walls affect the walls in such a manner that 828 a considerable amount of painting would be required—considerably more painting would be required than if the molding had not been removed? A. That is correct.

Q. Now, do you know whether the molding had originally been placed on the walls before or after any painting? A. The molding had been placed on before the original painting.

Q. So that underneath the molding there would be no paint whatsoever? A. That is right.

Q. How much more would you say it would cost to paint all those rooms because of the fact that the molding had been removed, than it would cost if the molding had not been removed? A. This contract did not include the removal of the molding. That was done after the painting was awarded. Anything paid for sparkling the walls, because of the removal of the molding, was paid for extra and in addition to the contract. 829

Q. Then, you say that the contract only took care of the painting of the walls with the molding on? A. That is right.

Q. And when was the painting done, after the molding had been removed? A. When was the painting done after the molding had been removed? 830

Q. Yes. A. Shortly after the painting work was started there.

Q. Will you please make clear this: whether this firm which had this painting contract, of which we are now speaking, in the defendants' exhibit which you hold in your hand—whether that contractor painted the walls which had been underneath the molding? A. He did paint the walls, yes.

Q. But not under this contract? A. I am not quite sure of that, but I can tell you very quickly. (After examining papers.). Yes, there was nothing mentioned here, but—let me see—I will have to take back what I said before. I note that there is a sentence here that the panel molding will be removed from the living rooms, bedrooms, and pantries. 831

Q. Was there any specific amount allowed for the doing of the additional painting because of

832 the removal of the molding? A. I don't recall that there was a specific amount allowed, no.

Q. Have you any idea of what the original cost of painting was, because of the removal of the molding? A. No, I have no idea now.

Q. Well, did you make any estimate at the time you were asking for bids? A. I don't recall that I did.

Q. Did you ask the bidders to allocate a specific amount as extra cost of painting because of the removal of molding? A. I don't recall that either —yes, I have that here. It is right in the contract: "For sparkling all walls, due to the re-
833 moval of panel molding throughout the building, $5,000", so that since that was deducted, it is not really charged up to the cost of painting.

The Court: Is that included in that $72,000?

The Witness: No, that is not included in the item of $71,650 or whatever it is. That has been deducted.

Q. I have not been able to read this contract, and it is so long and there are so many details in it, that I would like you, Mr. Lukach, to explain the different items in there, so that we may arrive
834 at the sum of $72,000 which is mentioned in Schedule A. A. The initial contract under the original Grad painting specification is $90,800—

Q. (Interposing.) Pardon me. The original contract— A. Yes. This is the contract I mean, of $90,800.

Q. And that is a contract between whom? A. Between the 5859 Realty Corporation and Landsman Brothers & Soffin.

Q. Do I understand, then, that there was a contract for $90,800 made for the doing by this contract of the work called for by the Grad specifications; is that right? A. There was a contract made in the amount of $90,800; and then there were certain additions and deductions, which brought the net amount paid to the contractor down to the price that you see in the schedule, plus some ceilings which were to be rekalsomined. 835

Q. But that $90,800 was the contract price for the doing of the work required by the Grad specifications? A. That is correct.

Q. In other words, if there had not been a bit of paint on that building, and the Grad specifications had been handed to the painter, his contract bid would have been $90,800, is that right? A. No, that is not correct. I think the contract specifically says "For finishing all painting". Not doing the painting from the original beginning, but for all the painting according to the specifications prepared by Frank Grad. 836

Q. And that amount of $90,800 is on top of whatever might have been done before? A. That is correct.

Q. Now, will you go on fairly slowly to state what deductions and additions were made? A. There were certain deductions and additions made, which brought the net price of $90,800 down to a price of approximately $71,000. Do you wish me to read all the items to you? 837

Q. I would like to have you do that, yes. A. "Should the builder require the painting for the entire building to be completed according to the specification, with addenda prepared by the 58-59 Realty Corporation, and attached hereto, instead of the specification of Frank Grad, above referred

838 to, there shall be deducted from the above price the sum of $19,150, made up as follows—"

Q. (Interposing.) Now, just a moment: So that you, in the preparation of your specification, left something out which was in the Grad specification? A. That is correct.

Q. Now, what was it that you left out, which accounts for the difference of $19,000? A. Well, I am prepared to tell you how that $19,150 is arrived at—which is the answer that you want?

Q. Yes.

The Court: You do not have to read everything on that schedule?

839 Mr. Murray: No.

The Witness: Well, the big item was for not washing off kalsomine from all ceilings, and painting with three coats of flat paint—as was called for by the Grad specification—deduct $32,000. There was another deduction in the amount of $2,700, and another deduction in the amount of $4,200, making a total of $38,900 of deductions. Now, I have certain additions—

Q. Just a moment: That would bring the total below $90,000, to $58,000, is not that right? A.

840 Whatever it is, yes.

Q. About $58,000, if those three items were not done? A. That is correct.

Q. Now, will you proceed? A. Yes. There were certain additions made. If you want me to read them—

Q. No. Just give me the dollars and cents of them. A. For sparkling all walls, due to the removal of panel molding throughout the building,

that was an addition of $5,000. For hanging lining— 841

Q. The sparkling was not a complete painting job on the parts of the walls where the molding had not been removed? A. Not a complete painting job, no; not sparkling and touching up with shellac.

Q. And that allowance was what? A. $5,000.

Q. Just for that sparkling? A. Just for that sparkling.

Q. And no painting? A. No. For hanging lining paper, wall-paper, and applying one coat of gelatin and one coat of varnish on walls and ceilings of guest-bathrooms, add $2,700. 842

Q. These items that you have just read are in addition to the Grad specifications? A. Yes, those were our own ideas of certain things that we wanted done, which we are not charging for.

Q. Did you add anything to that $5,000 for sparkling, for painting? A. No.

Q. Those particular parts of the ceilings or walls? A. No. The sparkling included just the paint on top of the sparkling. In sparkling you put on a coat of shellac, and then a narrow brush of paint right over that, so that the sparkling will not come through. It does not include complete painting of the wall, but just where the sparkling is done. 843

Q. But on top of the sparkling you had to paint? A. Yes, just a dab of paint to cover it up, so that the next coat would not be absorbed. There is an item of $600 for painting required because of alteration on the first floor. Another item of $6,500 additional for hanging lining paper and wall-paper on the walls of the public corridors and elevator vestibules. Another item of—

844 Q. Pardon me. You are going a little too fast for me. Then, there was papering done in the building? A. There was papering done, yes.

Q. And how much papering? How much of the building? A. All of the public halls, with their adjoining elevator entries, and the bathrooms were papered.

Q. Now, previously there had been some paint on those walls? A. Yes.

Q. When you paper, do you require any base for the papering? A. Yes, you require a lining paper.

Q. A lining paper? A. Yes.

Q. But do you require any base in the nature of
845 paint? A. No. There is another item of $3,350 for removing the kalsomine from ceilings of furnished apartments, and rekalsomining with colors to match. That is $3,350. Thus making a total of $19,750 of additions, which, deducted from the total deductions, gives a net deduction of $19,150; and if this is subtracted from the original contract, then you have the price that was actually paid, outside of the extras.

Q. Now, how much wall space was covered by paper? A. I can tell you. I can just tell you what sections of the building, but I can not give you the number of square feet of wall space.

846 Q. Did that $90,800 estimate for the work, based upon the Grad specifications, include the painting of all these corridors and walls where paper was subsequently placed? A. That included no paper at all, but only the painting as per the Grad specification.

Q. But it did include painting of those places where the paper was subsequently put on? A. Yes.

The Court: I understand that the Grad specifications which were included in the contract, Defendants' Exhibit I, had been included in the original Grad specifications when the contract was signed? 847

The Witness: I am sorry, Judge. I did not understand that. The original Grad specification is a part of this contract—

The Court: It is?

The Witness: Oh, yes. The two specifications—the Grad specification and the one that I prepared.

The Court: I am not talking about that.

The Witness: The Grad specification is a part of this contract. 848

The Court: When Mr. Grad drew up the specifications for that contract or when you used them in this contract, you did nothing more than to refer to his original contract, and take such part as was pertinent to that particular job?

The Witness: His original specification, yes. I took his painting specification out, as an entity, and made it part of this contract.

Q. Now, after the molding had been removed, Mr. Lukach, in addition to putting a coat of sparkle on the spaces which were then uncovered, you had also to paint them with two coats of paint? A. That is correct. 849

Q. Now, when you went through this building on your inspection, you made a note of everything that you saw that was undone or improperly done, did you not? A. Yes; unless there were certain objects that were very evident, because they were lacking from where the plans showed them; and then I just simply remembered them. For ex-

850 ample, the bronze grills, which were shown on the plans, but which were not in the building—

Q. I show you now Plaintiff's Exhibit No. 84 (handing witness). That is your list of uncompleted items, is not that so? A. That is correct—required to complete the building.

Q. Now, at any time prior to your preparation of that, did you see any estimate of anybody connected with the Prudence Company as to the cost of completion? A. I did.

Q. Do you remember when you saw that? A. Yes, approximately when I first went to the job.

Q. Do you remember that it was Mr. Billsborrow's estimate of the 16th of December, 1930 (exhibiting paper)? A. I remember seeing a number of Mr. Billsborrow's estimates. I am not sure of the exact date.

Q. Now, will you go through your list there, and leaving out the painting, the painting item, and leaving out the elevator item, and leaving out payrolls and taxes and electric lights, and steam, and considering only the actual items for the doing of the physical work in making complete the incomplete items, see how it compares with Mr. Billsborrow's estimate of December 16, 1930? A. You want me to compare trade by trade, and then

852 the prices?

Q. No, the totals. A. Oh, the totals?

Q. Yes. A. My—

Q. No. The totals. A. The total item for each trade?

Q. No, the entire total? A. I will have to deduct what you have just mentioned out of here—the elevators and the painting—

Q. Well, without doing that now—without deducting the actual items in dollars and cents, just

go through your estimate, and leave out all of these items that I have mentioned, and say what comparison there would be between Mr. Billsborrow's estimate of $9,500, exclusive of painting, and your estimate? A. Well, my answer immediately should be that this was much less than mine, and covered many less items. 853

Q. Now, roughly, the electric current bills were $5,000, and the Otis Elevator item is $14,500, making $19,500; the insurance is $1,600; making $21,100, approximately; the payroll is $20,000, making $41,100; the steam consumption is some $13,000, making $54,100; supervision is $6,500, making $60,600, plus; taxes $57,000, making about $117,00—is that right? 854

The Court: $115,000.

Mr. Murray: $115,000; is it?

Q. And the painting is $72,000, making about $189,000?

The Court: $187,000.

Mr. Murray: Yes, $187,000, without taking into consideration the odd dollars.

Q. Now, the difference between that and the total of $210,000, is about $23,000, is not that right? A. Yes. 855

Q. Now, I will hand you Mr. Billsborrow's estimate again (handing witness), and I ask you whether there is an item of bronze on there? A. There is an item of ornamental iron and bronze.

Q. And there is an item of carpentry? A. An item of carpentry finish.

Q. And an item of cement? A. Cement floor, and base.

Q. And is there an item of damp-proofing or water-proofing? A. No.

856 Q. Is there an item of electric,—missing parts? A. There is an item of electric fixtures.

Q. Is there an item of fireproof windows, missing stools? A. Fireproof doors hung, and bucks.

Q. Well, I find that here under "fireproof doors and bucks". There is no additional item there for fireproof windows? A. No.

Q. Like the missing stools? A. There is an item for metal sash and hardware.

Q. Is there an item for floors? A. There is an item for wood floors.

Q. Yes. Is there an item for glass? A. Glass and glazing.

857 Q. And an item for hardware? A. There is an item for hardware, yes.

Q. And an item for incinerator tools? A. No.

Q. You said there was an item for ornamental iron? A. Yes, that was included with bronze.

Q. Is there any item for kitchen cabinets? A. Yes, an item for apartment kitchen cabinets.

Q. And kitchen equipment? A. No.

Q. There is an item for lighting fixtures? A. Electric fixtures, which I presume is for lighting.

Q. And there is an item for cleaning, is there not? A. There is an item for removal of rubbish.

858 Q. Is there anything for plastering? Is there any item for that? A. Yes, an item for plastering.

Q. And plumbing? A. Yes, a plumbing item.

Q. Does that refer to curtains—shower curtains? A. I don't know what he had in mind.

Q. Is there anything for refrigerators? A. No.

Q. Steam-fitting? A. No.

Q. Terrazzo? A. No.

Q. Now, deducting Mr. Billsborrow's painting estimate of $14,000, we have remaining an item of

his of about $9,000, for performing all incomplete work; and that compares with your $23,000 for doing practically the same things—that is, the same items? A. No. You are deducting quite a number of items from that. 859

Q. Yes. A. And there were a lot of things that he did not include at all.

Q. I have deducted from Mr. Billsborrow's estimate the painting, and I have deducted from yours painting and elevator? A. But that is not a fair comparison, unless you add on the things that are lacking in his schedule, which I have in mine.

Q. Well, what else is there— A. (Interposing.) You mentioned, for example, a small item of incinerator tools, and kitchen equipment, and I think possibly a few other items. 860

Q. Well, those items bring your estimate $9,000 above your Billsborrow's? A. Yes, but you can not compare the two, because they are unalike.

Q. There is a difference of $14,000 in the two estimates? A. Yes.

Q. Roughly speaking? A. Yes, of course, roughly speaking.

Q. Without bothering with the dollars and cents. And, naturally—well, not "naturally," but in Mr. Billsborrow's estimate there is no consideration given to the items which you have included in your Schedule B, as omissions and substitutions? A. I can not tell, because the sum is lumped together there. 861

Q. So that as far as his estimate shows, there may be some such items in his estimate? A. I am not prepared to state what is in his estimate.

Q. Leaving the painting item out of Mr. Billsborrow's estimate, would you say it was an unfair

862 estimate of what it would cost to put in the lacking things? A. Exceedingly unfair.

Q. In what respect? A. That as far as I can see, it was practically entirely incomplete. It did not cover the items that were lacking.

Q. Well, it would only leave out $14,000—even according to your estimate; is not that right? A. But it did not take into consideration any of the substitutions and omissions from the original specifications.

Q. Exactly. I have indicated that he did not include in his estimate these omissions and substitutions of yours, which were included in
863 Schedule B; but I mean having in mind only Schedule A— A. (Interposing.) Well, it did not cover Schedule A completely either.

Q. Not completely? A. No.

Q. Certainly not? A. No.

Q. Did you know the contract price at which the original painting job was let? A. I was informed by a representative of the original painting contractor of a price which he said was the original contract price.

Q. Do you remember what that was? A. I would have to refer to this (indicating).

864 Q. Well, if I state that it was $56,000, would that refresh your recollection? A. No, because I think that was not the price that he told me. I have it here. I made a note on April 1st, 1931, entitled "Memorandum from Globe Painting Company," and their original bid for a complete job to Lefcourt was approximately $81,000. The contract that they received was in the amount of $44,000, and consisted of one coat of paint for all trim, two coats for all walls, serving pantries and

baths to have two coats; stair halls three coats; iron work one coat. The two coats on walls consisted of sizing, and one additional coat, and was never meant to be finished. Then there are some other items there—the total amount of sparkling— 865

Q. What was the total price? A. The price that they told me was $81,000.

Q. Do you know whether that $81,000 included decorating— A. I do not. This is what I have down here—what I was told.

Q. If on a total contract price of $56,000— A. I am sorry. I did not get that.

Q. I say, if on a total contract price of $56,000 for painting this building, $14,000 had been reserved for the final coat of paint, would you say that that was a proper amount for such reservation? A. I would say that was an improper amount. 866

Q. And that the final coat of paint would cost more than $14,000? A. No. I mean I can not agree that the price of $56,000 was a fair price for doing that painting of the building properly, so I certainly cannot agree on $14,000.

Q. Do you know whether there was any change in the cost of materials between 1929 and 1931? A. It was practically the same, as far as I know. There was not much of a change in that period. 867

Q. Do you know whether in 1930 prices for painting materials were high or low, comparatively speaking? A. As compared with—1930 as compared with what year?

Q. As compared with either 1929 or 1931? A. I should say it was about the same.

868 The Court: I suppose that the labor item, though, was less in 1930 than in 1929, or 1931 was less than 1929?

The Witness: Yes.

Q. Do you know whether the labor item was less in 1931 or greater—lesser or greater in 1931 than in 1930? A. I am not prepared to state.

The Court: There were Union wages?

The Witness: Oh, yes; all Union wages. All the work was done under Union wages.

Q. Now, will you explain to me, Mr. Lukach,
869 the item in Schedule A, being Item 3-C, of V. Foscato, levelling cement floors? Will you tell me what cement floors, where, and why? A. We placed a wood floor on approximately 60 per cent of the cement floors in the building; and before actually starting the laying of the wood flooring, we noticed that some of the cement floors were so much out of level that it would have been impossible to lay the wood floors on them, so these unlevel spots were ground down by terrazzo workers.

Q. And where were these wood floors that you were putting on? A. They were applied generally to 60 per cent of the building—throughout the
870 building.

Q. In what parts of the building? The living rooms? A. In the living rooms and bedrooms—

Q. In the apartments? A. Yes, in the apartments—the master section.

Q. Have you any independent recollection of how many of these rooms required that levelling process? A. No, but I can refer to the total number of hours spent in grinding them down. We have the bills to show for that.

Q. Now, as to Item 17, subdivision (b), water- 871
proofing elevator pits, do you know whether or not the elevator pits had been originally waterproofed? A. I don't know whether they were originally waterproofed, no.

Q. Who examined the pits for you, on which you based your conclusion? A. That they were not waterproofed?

Q. No; that there was waterproofing necessary to be done there? A. I examined them. Certain pits were full of water, and the elevator machinery was all ruined.

Q. Did your investigation permit you to de- 872
termine whether or not the pits had ever been waterproofed? A. No.

Q. That is, you could not determine whether they had ever been waterproofed? A. No, because they may have used an integral waterproofing mixture with the concrete, and it would not be possible to determine that.

Q. I see. So that if I told you that the pits had originally been waterproofed, there was nothing about the appearance of the pits to you, to indicate anything other than probably a bad job was done? A. I could not say. I did note that they were full of water, and had to be waterproofed. 873

Q. Waterproofing consists of what? A. It consists of either putting right into the cement some waterproofing material—some compound or chemical in the cement when you are mixing the concrete, or you may apply it to the surface. There are two methods.

Q. Which method was used in this instance? A. The surface method.

Q. Now, Item No. 6-A, under "Fireproof windows," Mr. Lukach, mentions missing stools and

874 trim. What is that item? A. The stool or apron is what we generally know as the sill. In the building there were metal sills there, and a lot of them were missing. Also some molding on the windows, some hardware, handles to raise the sash, and some catches to lock it.

Q. Now, at what part of the construction of a job are the stools put in? A. The stools are put in fairly early, before the plastering usually—the metal stools are.

Q. What occasion might there be for stools not being in the windows? A. What occasion?

Q. Yes. In other words, I think it is peculiar
875 that stools should not be in the window sills, or that a window sill should not be in, in some of the windows? A. It may have been due to the fact that the contractor left hurriedly, or that there was insufficient inspection on the part of the builder. I am not prepared to say why.

Q. But that work would have been done early in the construction job? A. It should have been done early, yes.

Q. Is there any possibility of their having been removed after they were placed on? A. It is possible.

876 Q. Do you know whether the indications showing around the windows showed that they were ever originally installed, or that they were never originally installed? A. I can not recall that now.

Q. Do you know whether under Item 9-A the Builders' Wood Flooring Company ever had any connection with the ballroom floor originally? A. I don't know whether they originally had any connection with it or not.

Q. The item for scraping and finishing the ballroom floor and platform, from your inspection of

the ballroom, were you able to determine whether 877
or not the ballrom floor had ever been scraped and finished? A. No, I am not prepared to say that. I know it was rough, and needed scraping. It never could have been used for dancing the way it was.

Q. When was this particular item completed, approximately? A. As I recall, that was fairly late; pretty close to October.

Q. And during these many months before that, there were people constantly in and out of the building, were there not? A. Yes, but not in that section, because that was blocked off. That was a banquet section, which was not used until much 878
later.

Q. So that prospective tenants were not permitted to go into the ballroom? A. They sometimes just looked in, but it is not connected with the hotel now really; it is a separate enterprise. That is why we did some alteration on the first floor.

Q. You say it is not connected with the hotel now? A. I understand that they use it for some kind of a dancing club.

Q. But at that time, prior to 1931, it was not disassociated from the rest of the building, was it? 879
A. Yes. We had put up a partition running right across, next to the 59th Street entrance, to keep that closed, because we did not want tenants to think it was part of the lobby.

Q. Now, under "Glass replacements," 10-A, in this later schedule, you make a charge which I believe is considerably higher than the original estimate made by you back in June and July of 1931. Could that have been caused by the fact

880 that there was additional breakage? A. No; a lot of this revision was due to the fact that we had the bills, but could not find the vouchers or checks for them, so we did not include them in the original schedule, but in going over more recently we discovered additional checks, and we felt that the items should then be included in the revised schedule.

Q. Well, these checks which you are now speaking about were, then, paid before your original computation was made up in June, 1931, were they? A. Before June?

Q. Yes. A. Some of them were and some of
881 them were not. We were making payments right along in that period.

Q. But when you prepared a claim for the Prudence Company in June, 1931, you had an item for glass? A. Yes.

Q. Glass breakage, $341.56 (handing witness). Is that correct? A. That is right.

Q. Whereas, today, in Schedule A the item is $1,431.40. Now, is it not possible that a considerable amount of that addition of $1,000 was caused by breakage in the meantime? A. No; we had some difficulty in locating all these vouchers and
882 checks. They were distributed between Brooklyn, the office of the Prudence Company, and New York; and only recently a number of them were located.

Q. And you swear, then, that—or not "swear," but you are positive, then, that this $1,431 does not include any breakage after June, 1931? A. To the best of my knowledge, that is correct.

Q. Now, under Item 11-D, amount paid to Rosenthal Hardware Company for unattached

hardware left in building when taken over, $406.10; how does that item happen to arise? A. The hardware was in a room in the basement. It was hardware that we had to use in the completion of the building, but the representatives of the Rosenthal Hardware Company told us that we could not use it unless we paid for it, because they said they had not been paid for it; and I consulted Mr. Hetkin, the attorney for the Prudence Company, and was advised by him in writing that I should pay that amount. 883

Q. Were there any unopened boxes in the cellar or on the premises at all, other than this hardware that you speak of, when you first made your inspection? A. I do not recall any unopened boxes. 884

Q. You at no time saw boxes which looked like the shower-curtains? A. No, at no time.

Q. Now, under Item 27-B, an additional item under painting, which is a new item—rekalsomining 154 ceilings at $8—when was that work done? A. That was done while the general painting was going ahead. Those ceilings were discovered by us to have been stained with rust, due to the wire reenforcement of the arch or to dampness or other imperfections in the kalsomining, which made it necessary to rekalsomine them.

Q. Sometimes that rust does show through, does it not, even in the best of painting jobs? A. No, not in the best. A good painting contractor will not put kalsomine over a piece of wire that is sticking out, or where there is a rust spot on the plaster. 885

Q. Well, suppose that there is no evidence of rust when the painting is first done, is it not the fact that rust may come through later on? A. It

886 is possible. That only happens in a very comparatively few cases. It is not general.

Q. Now, the payroll of Bing & Bing's employees, Mr. Lukach, of $12,222.12; what period did that cover? A. That covered from the time I first went on the job until we left it.

Q. And when did you leave? A. I think it was either some time in the latter part of October or possibly the beginning of November.

Q. And this payroll included the salaries of whom? A. That included the salaries of—you mean the item in the schedule?

Q. $212,222.12. A. It included my own salary;
887 Mr. O'Brien, an assistant; a secretary, who was really a stenographer; a clerk or maybe two clerks in the beginning; and some laborers.

Q. What were the duties of the clerks? A. The clerks were to take care of people who came in—contractors who came into the office—to give them plans, and to get out specifications, and to run errands. They were really office boys, on a construction job.

Q. To give out what plans? A. Plans around in the building—plans of the building, and specifications.

888 Q. You mean to give them back to the original contractors? A. No; we never saw the original contractors.

Q. Were plans necessary for each contractor who did the slightest bit of work on that building? A. Usually they came down in the office to consult the plans, yes.

Q. Did they require plans for the installation of missing stools? A. No, but they required sometimes a clerk to go up and down, to point out things for them—to go through with them.

Q. And, in addition to that general item, there is an item of elevator operators. When were the elevators started in operation? A. There was one elevator working as soon as we got to the job. 889

Q. And for how long a period is this charge of $2,236 for elevator operators? A. The elevator charge, as I recall, goes right through to October 1st.

Q. From when? A. From when we first went on the job.

Q. And is that same answer to be given as to the item of porters? A. No. That same answer is not to be given there, because the item of porters was only up to—if I may refer to a sheet that I have here— 890

Q. Yes. A. (After examining paper.) The item of porters was only up to August 1st, because we felt that beyond that time it was not really chargeable to completion.

Q. And what had they been doing prior to that? A. General porter work, such as cleaning, and sweeping, removing rubbish, and loading it on trucks, and carrying heavy things around—doors, and so forth.

Q. Did you not pay an item for removing rubbish? Did you not have contractors to remove rubbish? A. Yes, but there is a difference. The item that was paid for rubbish was only for the hire of the truck. We had to get the rubbish from the building, to put it on the truck. That is so much a load for removing rubbish. 891

Q. Well, the contractors, Cox & Graham— A. They did nothing but bring the truck to the back entrance of the Essex House. We had to take the rubbish from the floors, and put it out for them.

892 Q. Now, labor in plaster patching, was that the cost of labor to a plastering contractor? Is that right? A. To both the plastering contractor, and in some cases our own laborers, who did the small plaster patching.

Q. And you would pay your laborers in addition for doing that? A. No. A separate item was kept of the amount of time expended by the laborers who did plaster patching.

Q. But the item of $436 shown as labor in plaster patching was paid to a contractor's laborers? A. To both; to a contractor's plasterers, and to our own laborers.

893 Q. And to your own laborers? A. Yes.

Q. Now, Item No. 33, Mr. Lukach, insulation of steam and incinerator ceilings; is that provided for by the original plans and specifications? A. The original heating and ventilating specification provides for the insulation of the steam-room ceiling.

Q. The original steam-fitting— A. The heating and ventilating specification which we followed at the building called for the insulation of the steam-room ceiling.

Q. And where did you get that specification? A. It was given to me when I went on the job.

894 Q. Now, the supervision fee of $6,500 for completion; that was in addition to the salary which was included in the payroll? A. That was in addition, yes.

Q. I notice in Item 18 electric current the cost of the current appreciated considerably in June, July and August. Do you know why? A. There were more people in the building at that time.

Q. When was there a rental office opened in the building, Mr. Lukach? A. I should say approxi-

mately two months after I first came. In general I mean that was the time. I am not sure of the exact date. 895

Q. Early in June, probably? A. I really cannot say that exactly.

Q. Thereafter did you notice whether people came in and out? A. Yes.

Q. Who were prospective tenants? A. They started to come in a little after June.

Q. Do you know how many tenants moved in there before October 1st? A. I have not got the exact number, no.

Q. Well, were there a few? A. Oh, no. Before October 1st? 896

Q. Yes. A. Comparatively few. The leases started October 1st, and they usually did not get in there until after that date.

Q. After October 1st was there a considerable number of tenants? A. Yes.

Q. Do you know whether any tenant was in there before October 1st? A. Offhand I don't know.

Q. Consider Item 40 on Schedule B. That is the racks and shelving—mail and key racks, file racks, etc. I will give this Plaintiff's Exhibit 85 to you (handing witness). In the rearrangement of the ground floor was provision made for the same spaces for clerks and information desk and telephone room, and so forth? 897

Mr. Judd: I object, your Honor. That is the same sort of questions that were gone into yesterday.

The Court: Sustained.

Mr. Murray: Exception.

898 Q. Where did you get, Mr. Lukach, the amount $1,650 for bronze screens omitted from lobby floor? A. I have an estimate of that amount from the contractor who did the work. It is in the original Schedule A.

Q. Did you ever know how many bronze screens that included? A. Yes.

Q. How many? A. I would like to refer to the estimate, if I may.

Q. Yes, surely.

(Mr. Judd hands witness paper.)

A. They were omitted from the space between the
899 elevator lobby and the fountain lounge and between the palm room and the lobby, and between the elevator lobby and stenographers' room.

Q. Is that three screens? Does that constitute three screens, Mr. Lukach? A. That constitutes three.

Q. Was that a lump sum, $1,650—a lump estimate for the installation of these three, or were there itemizations for each one? A. No, that was for these three. There may have been a total bid for which we did some work, but this was a total amount allocated for those screens.

Q. Who gave you that estimate? A. The Subur-
900 ban Bronze & Iron Company.

Q. They were the people who did the original bronze work, weren't they? A. I cannot recall that.

Q. Do you remember how you came to communicate with them rather than somebody else? A. I think they came around to the job and solicited the work.

Q. From whom did you get the estimate of $525 of glass for the screens? A. That was the amount that they figured for glass, too, in their estimate.

Q. The Suburban? A. Yes. 901

Q. From whom did you get the estimate $150 for racks and shelving, 40 (a)? A. That is my own estimate.

Q. That is based upon your previous experience as to what those things cost? A. That is correct.

Q. And subdivision (b) of that some item? A. The same applies to (b).

Q. And (c)? A. (c) the same thing.

Q. What would file racks and the wood screens on counters be, Mr. Lukach? A. What would what be?

Q. What are file racks and wood screens on counters? A. The plans and details show wood 902 screens approximately two feet six wide by about four feet high.

Q. What is a wood screen? A. It is something in this case that the architect had in mind standing on the counter so that it would conceal a cashier or somebody behind the counter who was doing something that they would not want the guests to see.

Q. Subdivision (d), whose estimate was that? A. That is my estimate, too.

Q. Did you communicate with the Telephone Company? A. I did not communicate with the Telephone Company. 903

Q. Do you know whether the Telephone Company instals telephone booths free of charge? A. I do not know whether they do or not.

Q. Is there a telephone room in the building now? A. I don't think there is a regular telephone room. There is a space where they have a booth, if I am not mistaken. But no particular telephone room.

904 Q. Is there a telephone operator there? A. There is the main telephone operator. Oh, you mean the main switchboard. That was on the second floor. There is a main swithboard telephone room.

Q. But this telephone room was not a room for the main switchboard operator, it was a telephone room where people might go to make calls? A. Which are you referring to, this item here or the second floor that I mentioned?

Q. I am referring now to item (d). A. Item (d) showed on the plans private telephones that the people on the ground floor could go in and
905 drop their nickels and use the phones.

Q. Whose estimate is the $1,158 for item (e)? A. That is an estimate of mine based on the unit price given me by the manufacturer for folding wood doors.

Q. Item 2, Kellastone carpet strips. Who figured the lineal feet originally? A. Originally it was computed by the Kellastone people.

Q. And subsequently it was determined that the lineal feet measurement was high? A. We subsequently had it checked by somebody else, and since his lineal footage was less we used the smaller of the two figures.

906 Q. Whose estimate is the cost of six and a half cents? A. The estimate of the Kellastone people.

Q. Kellastone carpet strips were not put in at all at any time? A. No.

Q. They were not put in by you? A. No.

Q. What system was used for keeping the carpet down? A. We drilled a series of holes around the perimeter of the room, in the cement, and plugged them with wood.

Q. And many people use that instead of strips; isn't that so? 907

Mr. Judd: I object, your Honor.
The Court: Sustained.
Mr. Murray: Exception.

Q. Whose is the estimate for wood stools and aprons? A. That is my estimate.

Q. In 2 (c), Mr. Lukach, you say wood flooring omitted in private dining room, $800. Are you sure that the wood flooring was omitted in the private dining rooms? A. I am not positive on that point. That item was in Mr. Grad's schedule.

Q. You were there before Mr. Grad, weren't you? 908 A. I was.

Q. And the space for the private dining rooms was there at that time? A. They were.

Q. Can you go back now and remember whether or not there was flooring in the private dining rooms? A. No, I can't remember that item.

Q. What was Mr. Grad's duty; was it to compare the specifications with the work to see in what respects the specifications were not complied with, or was it his duty to go through the building and see, as you had seen, its exact condition? A. He made a check-up of the building to find out how the construction items as done deviated and differed from those originally specified and planned. 909

Q. Are these private dining rooms still in existence? A. No.

Q. At any rate, at the time of your inspection, Mr. Lukach, you made no mention of the fact in your report that wood flooring was not in private dining rooms? A. I do not think I—I did not make mention of that item.

Q. Whose estimate of $800 is this? A. This is an estimate of Mr. Zilber.

910 Q. Item 3, cement base. Whose estimate is that? A. Mr. Zilber.

Q. Did you estimate the cost of wood flooring for private dining rooms? A. No, that was Mr. Zilber's estimate.

Mr. Murray: Well, I understood that Mr. Lukach—Mr. Lukach's testimony was, or it was to be taken or assumed, that Mr. Lukach was stating what the reasonable value of these items was.

Mr. Schenck: That is true, but he has based some of the items—the figures are arrived at directly on his figuring on his bids and on his
911 estimates, and in other cases the figure has been arrived at by Mr. Zilber whom we have here, and Mr. Lukach in conference with him has approved, and we are for the purpose of shortening the matter reserving Mr. Zilber for rebuttal.

Q. Then your estimate, if you made any estimate, Mr. Lukach, of either the private dining room flooring or the omission of sanitary cove, is based on what Mr. Zilber told you? A. No, he put a price on it and I figured it out and agreed that that was a fair price based on my judgment.

912 Q. Then is this item of $800 your estimate of the cost of doing this work? A. It is Mr. Zilber's estimate, with myself coinciding.

Q. What is a sanitary cove? A. A sanitary cove is a quarter round section of a cement base, to make it easy to take the dirt out so it does not accumulate.

Q. It comes out from the wall somewhat? A. No, it does not come out from the wall. If you want I can draw it for you.

Q. Yes. A. (Witness draws on blackboard.) 913

Mr. Judd: We can show it to you on the plans.

The Witness: Yes, it is a section of the plans.

A. (Continuing.) The ordinary base would be like that, but a sanitary cove base would have this little quarter round section, so as to make it easier to clean.

Q. Would that interfere with the carpet going close up against the wall? A. If it were in the rooms where the carpet was to be placed it might interfere with it. 914

Q. Whose is the estimate of closets omitted from servants' rooms? A. That is an estimate of Mr. Zilber and myself.

Q. Do you know where the barber shop is in the building now? A. Yes.

Q. Or where it was after completion? A. Yes.

Q. Where is it? A. It is to the west of the 50th Street entrance at present.

Q. Is that the same spot for which it was originally planned? A. No.

Q. Item 22, medicine cabinets. Are you responsible for this language, Mr. Lukach? Or is this your language: "Difference between amount actually spent and amount called for in specifications as medicine cabinet expense"? 915 A. Yes, that is my language.

Q. You had examined the specifications in that regard? A. I had.

Q. And the medicine cabinet allowance provided for was what? A. $10,000.

Q. How did you find out what was actually spent? A. It is on a requisition.

916 Mr. Schenck: I think I should object, if your Honor please, as to Item 22. Mr. Murray stated on the record: "We admit that what was paid for the medicine cabinets was not the amount that was stated in the original specifications as allowance for medicine cabinets, and that the difference is the amount stated."

Mr. Murray: All right, I am not contesting that.

The Court: Then why waste time with that?

Mr. Murray: I mean I am not contesting the actual amount. I am trying to find out
917 how he learned these things, learned this estimated difference.

Q. This amount was put in solely because of the $10,000 which appeared in the original specifications? A. Yes.

Q. The difference between the amount actually spent by Prudence Company to complete painting and the amount which would have been required to comply with the plans and specifications as shown by contract with Landsman Bros. & Soffin, $19,150. There was no provision in the specifications, was there, Mr. Lukach, that any specific
918 amount of money should be spent on painting? A. No.

Q. And if a proper painting job were done it would be immaterial whether it were $90,000 or $50,000? A. If the painting had followed the specifications.

Q. Yes. A. Of course.

Q. You say that you have completed a painting job up there; haven't you? A. We have completed the painting job.

Q. Have you a record, Mr. Lukach, there which you could give me of that part of the specifications which calls for liquid soap dispenser system? A. Yes, I think so. The plumbing specification, page 40. 919

Q. Do you refer to a particular specification which is here in court? A. Yes.

Mr. Murray: I might say, your Honor, that this is one of the specifications which Mr. Grad identified yesterday as one which he brought to The Prudence Company at the time he brought this bond volume of specifications.

920

The Court: Yes.

Mr. Murray: There has been no evidence yet that this is one of the specifications upon which this loan was granted; no proof yet that this is one of the specifications that was approved at the time of the granting of the loan.

Mr. Schenck: I would draw a different conclusion from the evidence, inasmuch as Mr. Grad identified that as a specification prepared by Frank Grad, Architect, which he delivered at the same time that he delivered Exhibit No. 4.

921

The Court: In your proofs you prove the making of the contract and as to the sufficiency of the specifications. I had assumed then that that was the subject matter of the building agreement. There was nothing at that time said about any other specifications, and the matter arose only as the result of some cross examination, one question being directed to Mr. Grad. Do you regard this—referring to the specification Exhibit No. 4—

922 as specifying a possible construction? Then it developed that these various items were omitted—plumbing, heating, electrical work and other things that he classified as mechanical, I suppose in contradistinction from structural. But the mere fact that he delivered these things to some official of The Prudence Company at the time that something else was delivered is not sufficient to make this other delivery part of the contract.

Mr. Schenck: The specifications are made a part of the building contract by recital in the building contract, the recital being on
923 plans and specifications of Frank Grad, Architect; and it was through an oversight on my part that when I was handing the specifications to Mr. Braislin I did not hand him this second blue printed set.

The Court: I think there is not enough in what Mr. Grad said to warrant me finding that these other specifications were part of the contract, and it would seem to me desirable for you to recall Mr. Braislin or some other officer so that the matter may be proved if it is necessary for your purposes.

924 Mr. Schenck: Yes, sir. I shall take advantage of that, your Honor.

Q. Item 32, Mr. Lukach. What does that mean, "Amount demanded by Fordham Cornice Works to furnish guarantee called for by specifications"? A. The specification called for the roofing contractor to guarantee the roof over a period of years against leaking, and speaking to the contractor, the Fordham Cornice Works, he said that he did not furnish a guarantee because that would

require a better quality of material used, and 925
that if we wanted the guarantee as called for in the specification he would have to pay him the additional sum of $500.

Q. Did he show you his original contract with the Central Park Properties? A. No, I did not see the original contract.

Q. Item 33, subdivision (d). That is in reference to the radiators for interior bathrooms? A. Yes.

Q. In your investigation of the interior bathrooms, Mr. Lukach, did you find any electric outlet which would have permited the use of an electric heater in the bathrooms? A. I did. 926

Q. Item 35, subdivision (b). When was this change as respects terra cotta on the facade discovered? A. It was discovered after I had made my original survey.

Q. You testified, I think, that prior to making your investigation and inspection you had examined the plans and specifications in detail so that you would familiarize yourself with the requirements thereof. A. That is correct.

Q. Just when was this discovered, do you know? A. I imagine it was discovered when Mr. Grad went through the building and consulted 927
his plans and specifications.

Q. Then it was Mr. Grad rather than you who discovered this; is that it? A. Mr. Grad called that to my attention.

Redirect examination by Mr. Judd.

Q. Mr. Lukach, while the alterations which you spoke of making in the Essex House were going on did you stop the work of completion? A. I did not.

928 Q. The two were going along pari passu? A. They were.

Q. Will you tell us what the condition of the elevators was when you entered the building? A. A final check-up inspection had not been made of the control panels, motors, the overhead machinery, and the signal equipment was not in working order.

Q. What was required in order to put the elevators in working order? A. It required the services of the Otis Elevator Company.

Q. And how much did you have to pay them in order to have the equipment completed?

929. Mr. Murray: I object to that question.

The Court: How is this redirect examination? It has been all covered in Schedule A, hasn't it?

Mr. Judd: There has been an attempt to show that the payment covered something besides the completion of the elevators.

The Court: I see.

Mr. Murray: He has testified about that.

The Court: I overrule the objection.

Mr. Murray: Exception.

A. $14,500.

930 Q. Had the Otis Elevator Company filed a conditional bill of sale against the premises? A. I was not sure of that point.

Q. In connection with the painting contract, Mr. Lukach, was there any painting done where the panel moulding had been removed, beyond the ordinary wall painting, which was not covered in the $5,000 additional item? A. No.

Q. Concerning which you have testified? A. No.

GORDON S. BRAISLIN, recalled by the Plaintiff, testified as follows: 931

Direct examination by Mr. Schenck.

Q. Mr. Braislin, at the beginning of the trial I showed you a certain bound volume which has been marked Plaintiff's Exhibit 4 (handing witness), and you testified, as I remember it, that that was submitted to you before the building loan was made and was the specification referred to in the building loan agreement on which the loan was made. A. Yes.

Q. I show you Plaintiff's Exhibits Nos. 98, 99, 100, 101 and 102, and ask you if those documents 932
(handing witness) were submitted to you at the same time as Plaintiff's Exhibit No. 4 and equally with Plaintiff's Exhibit No. 4 constitute the specifications on which the building loan was made? A. Yes.

Cross examination by Mr. Murray.

Q. Mr. Braislin, I understood you to testify on direct examination the other day that the loan had not been arranged by you. Is that correct? A. That is correct.

Q. Do you claim now that these or any specifications were submitted to you personally? A. These 933
are the specifications that were sent to me by the New York office at the time the loan was signed up, as being the specifications referred to in the letter of acceptance.

Q. The building loan agreement provided, did it not, that the plans and specifications should be initiated by the lender and the borrower? A. Without checking it I cannot tell you.

934 Q. I refer you to Paragraph Seventeenth of the building loan agreement, and ask you whether that is so (handing witness)? A. No, it says, "and amendments thereto made by the lender in a memorandum dated September 24, 1929, and initialled by the lender and the borrower." That memorandum has been submitted in evidence.

Q. Doesn't initialing apply to all these plans and specifications? A. No, I don't take it so. That memorandum, if you will recall, was initialled by Mr. Haas and Mr. Bigelow.

Q. I understand, but you say there is no requirement in that agreement for the initialing of
935 the plans and specifications? A. I don't take it so, no.

Q. Is there any initial on these specifications?

Mr. Schenck: You refer to what exhibits?

Mr. Murray: Referring to the mechanical specifications.

A. I did not see any.

Q. Is there any initial on these specifications?

Mr. Schenck: Referring to Plaintiff's Exhibit No. 4.

A. Not that I noticed.

936 Q. (Mr. Murray hands witness exhibit.) A. I do not see any initials, no. But there are initials on the memorandum which is referred to in that building loan agreement and which is in evidence.

Q. Where were these specifications obtained from before trial? A. From our Engineering Department. They have been there all the time.

Q. Did you get them from the Engineering Department? A. They were given to me by the Engineering Department.

Mr. Schenck: The plaintiff rests.

937 Mr. Murray: If your Honor please, I move to dismiss the complaint upon the ground that the plaintiff has failed to establish any damages. I move to dismiss upon the ground that the evidence establishes that prior to December 16, 1930, The Prudence Company had reserved $75,000 for the completion of the work after an agreement between The Prudence Company and the principal on the bond, that that $75,000 would have been sufficient to complete the job.

The Court: The motion is denied.

938 Mr. Murray: I move to dismiss the complaint insofar as it seeks to recover for any electric current under Item 18 of Schedule A supplied after March 17, 1931, the date upon which the plaintiff became the owner of the property, and move to dismiss as to the item of insurance under No. (7) in Schedule A, or any insurance after March 17, 1931. And I move to dismiss as to the payroll Item 41 of Schedule A or any payroll paid after March 17, 1931.

939 I move to dismiss as to steam consumption, Item 34 of Schedule A, as to any steam consumed after March 17, 1931. I move to dismiss as to Item (4) of Schedule A or any part of the supervision fee which applied to the period after March 17, 1931. I move to dismiss as to No. (5) of Schedule A or any part of the first half taxes of 1931, after March 17, 1931. I move to dismiss as to Item (5) of Schedule A, as to any part of said taxes. I move to dismiss as to Item 24 of

940 Schedule A, or any telephone charges after March 17, 1931.

The Court: I will deny the motion.

Mr. Murray: I move generally to dismiss as to any of the items which I have just previously enumerated, for the period after January 6, 1931, that being the date upon which Mr. Braislin said The Prudence Company went into possession.

The Court: I deny the motion.

Mr. Murray: Exception. At this time, your Honor—I do not think it is ever necessary to offer in evidence a pleading in the

941 action—

The Court: Yes, it is. If you want to use it as evidence it has to be offered as an exhibit.

Mr. Murray: Then I shall offer in evidence Paragraph XXXIX of the complaint, which gives the facts as to the foreclosure of the mortgage and the sale upon said foreclosure.

The Court: That will be received.

Mr. Murray: It won't be necessary to mark it, will it, your Honor?

942 The Court: No.

DEFENDANTS' CASE.

943

PHILIP H. GLADSTONE, called as a witness in behalf of the Defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Gladstone, what is your business? A. Painting and decorating contractor.

Q. In or about the year 1930 with what concern were you connected? A. Globe Painting and Decorating Company, Inc.; vice-president and general manager.

Q. Was it your firm which had the contract for the painting of the premises on 59th Street now known as the Essex House? A. Yes. 944

Q. Will you state how you came to make the contract and what the contract called for, and what you did under that contract? A. On or about May 28, 1930, we were requested by the Central Park Properties, Inc., to submit an estimate for the painting and decorating of the property known as Central Park Properties, 160 West 59th Street, and we submitted an estimate on May 28, 1930.

Q. Was that estimate based on some facts which had been submitted to you? A. This estimate was based on furnishing labor and material necessary to do the painting in accordance with the plans and painting specifications. 945

Q. What estimate did you give? A. $81,494.

Q. Was that estimate based upon the plans and specifications? A. This estimate was based upon the plans and specifications.

Q. Did you thereafter enter into a contract with Central Park Properties for the doing of painting work? A. We did.

946 Q. Have you a copy of that contract? A. I have (handing counsel).

Mr. Murray: I offer it in evidence.

(Marked Defendants' Exhibit J.)

Mr. Murray: It just occurred to me, your Honor, that there might be some confusion as to the question of the damages sustained by the plaintiff arising out of the foreclosure. My impression of it was that the plaintiff was relying now for damages entirely upon Schedules A and B as revised. Under the circumstances I think I should move to dismiss the
947 complaint as to any other items of damage than those items stated in Schedules A and B.

I move to dismiss the second cause of action, your Honor, stated in the complaint.

(Colloquy of Court and counsel omitted.)

The Court: I see nothing to do except to grant the motion, and that I shall do.

Mr. Schenck: I shall take no exception, and I shall take whatever advantage I can from the motion, on the limitation to the issues as formulated by the first cause of action.

948 The Court: The motion to dismiss the second cause of action is granted.

Q. I show you Defendants' Exhibit J, Mr. Gladstone (handing witness), and ask you to briefly state what the contract was that you made with the Central Park Properties for painting? A. The contract was for all painting work on the premises known as 155-165 West 58th Street, 160-170 West 59th Street, in accordance with and agreeable to the plans and specifications.

Q. Were there any alternates in that contract? 949
A. There were. There was Alternate No. 1: should the owner decide to omit the final coat of paint from all tenants' quarters of the building herein mentioned the contractor agrees to allow the owner to deduct the sum of $10,321 from the amount due him under this contract. This is Alternate No. 2: Should the owner decide to omit the final coat of paint from the public and service corridors and the servants' rooms of the building herein mentioned the contractor agrees to allow the owner to deduct the sum of $2,264. Alternate No. 3: Should the owner require this contractor to paint the cement floors and base in the ser- 950
vants' rooms, stairways, service corridors and rooms of the said building herein mentioned, the owner agrees to pay the contractor the additional sum of $1,273. Alternate No. 4: Should the owner require the contractor to grain the passenger elevator bucks similar in all respects to the graining on the elevator doors, and which graining on the bucks herein mentioned must meet with the approval of the owner, then the owner agrees to pay the contractor an additional sum of $220.

Q. Did you do all the work called for by the contract, Mr. Gladstone? A. Yes.

Q. And that constituted the painting of all the 951
portions of the premises to be painted except the final coat of paint? A. The exterior had the final coats of paint on and were included in the contract. The interior had all the ceilings completed, sized and calcimined. The walls had the zinc sulphate wash, the first coat of prime, sparkling, and the second coat of paint, and all the interior trim such as doors, windows, bucks, ironworks, etc., had the coat of paint.

952 Q. The final coat of paint, Mr. Gladstone, was not put on the walls of this building by you? A. No.

Q. And you had left that out as one of the alternates for which you were allowed the sum of $10,300; is that right? A. That is right.

Q. Under the terms of your contract did you agree to go back at any time to paint that final coat for the sum of $10,300? A. May I look at the contract?

Q. (Mr. Murray hands witness paper.) A. Well, in accordance with this contract we were supposed to have put on the third coat of paint,
953 but the owner had an option to omit it during the life of the contract.

Q. And if he omitted it the contract price was to be less by $10,300; is that it? A. $10,320, in the tenants' quarters, and $2,264 in the service quarters. There were, of course, unit prices in our contract which took into consideration the possibility of additions and omissions.

Q. When was the last work performed by you on the building? A. I have a weekly report ending 12/3/30, but we were on there probably another week or two after that.

Q. So that you were on the job until about De-
954 cember 10th or 17th; is that correct? A. Approximately.

Q. And when you left the job there still remained to be done the final coat of paint? A. That is right. On the interior.

Q. On the interior, and you had not contracted to do that? A. We had not. We had contracted for it, but the owner took advantage of the clause in the contract which omitted it.

Q. What kind of material did you use in the performance of that painting job so far as quality

was concerned? A. As far as quality, it was first- 955
class material, required by the specifications.

Q. Did you see the workmanship which went into the application of that material to the walls? A. Yes, I was there practically every day.

Q. What was that workmanship so far as quality was conerned? A. First-class. Executed by skilled Union mechanics who had been in our employ anywhere from fifteen to eighteen years.

Q. How long had you been in the painting and decorating business, Mr. Gladstone? A. Since 1919.

Q. After that date, or in December, was there any subsequent time when you were particularly 956
in contact with the building again, in any manner? A. I was requested by Mr. Billsborrow, I think is the name, of The Prudence Company, to submit an estimate.

Q. An estimate of— A. Some time in February, of 1931, which we did.

Q. Have you got a copy of the letter requesting that estimate? A. No, I have a copy of our estimate.

Q. Do you know the form in which the request came to you from Mr. Billsborrow? A. I think it was a telephone call to our office.

Q. Had you ever talked with Mr. Billsborrow 957
over the telephone before? A. Regarding this estimate or—

Q. Regarding anything? A. Well, I have spoken to Mr. Billsborrow on two or three occasions before that, in reference to other work they were doing, and we tried to solicit.

Q. Did Mr. Billsborrow or not speak with you over the telephone when an estimate was requested, Mr. Gladstone? A. I spoke to Mr. Bills-

958 borrow with regard to the estimate that we submitted.

Q. Did you later on submit an estimate to anybody connected with The Prudence Company or to The Prudence Company itself? A. We submitted an estimate to The Prudence Company on February 18, 1931.

Q. Have you got a copy of that estimate? A. I have.

Q. May I see it? A. (Witness hands Mr. Murray.)

Q. Did you go to the building at any time in February, 1931? A. Yes.

959 Q. And what did you do while you were there? A. Made a general survey again of the conditions on the building as regards the paint.

Q. And after that investigation did you make ~~an~~ estimate to The Prudence Company? A. We did.

Q. Well, later on did you have any communication from Mr. Lukach? A. I did, and our office had a telephone request to call to see Mr. Lukach.

Q. Did you have any direct communication yourself with Mr. Lukach? A. I visited Mr. Lukach on the premises.

960 Q. Did Mr. Lukach ask you to do anything at that time when you saw him? A. He asked me to submit an estimate for painting work on the premises.

Q. And in accordance with that request, did you submit an estimate? A. Yes.

Q. Is this the estimate which you submitted to ~~Mr.~~ Lukach (handing witness)? A. Yes.

Mr. Murray: I offer that in evidence.

(Marked Defendants' Exhibit K.)

Mr. Murray: This is an estimate, your Honor, to furnish labor and material for $69,800, with various alternate estimates included therein. 961

The Court: What is the date?

Mr. Murray: April 8th, 1931.

Q. Now, what were these alternates which are mentioned in that estimate (handing witness)? A. Well, we have them only by number—alternate one, two, three, four and five, which were part of a painting specification which was submitted to us to guide us in making up our estimate.

Mr. Murray: Have you a copy of the painting specification? 962

Mr. Schenck: No; it is in the contract.

Q. I show you now Defendants' Exhibit J, and appearing in there are addenda to painting specification, and I ask you whether the alternates mentioned in your estimate are the alternates which are mentioned in that instrument (handing witness)? It is the last page, I understand. A. Yes; I am just looking through this. (After examining paper.) Alternate No. 1 refers to the ceilings—

The Court: The question is whether the alternates referred to in this estimate of yours are the alternates in this Exhibit J? 963

The Witness: (After further examining paper.) Yes, alternates Nos. 1 and 2 of our estimate are intended to refer to alternates Nos. 1 and 2 in this specification.

Q. And are they the same as alternates 1 and 2 of this specification? A. Yes.

Q. Now, what work did this estimate of yours cover—the estimate shown in your letter of April

964 8, 1931, Defendants' Exhibit K? A. It included the painting as required by that specification, which I notice, in a communication to Mr. Lukach in answer to an inquiry, included the following work:

"For your information, we are listing the costs of work required by the new specifications, which was not included in the previous specification:

"Sparkling and papering required because of the wall molding being removed, $5,900.

"Additional coat of paint on walls, $9,500.

965 "Additional coat of paint on trim, $10,000.

"Papering corridors, $5,000.

"Cement floor painting, $2,000.

"Lettering, $1,000.

"These items were included in our estimate of the 8th, totalling $69,800."

Now, do any of these or were any of these items items which had already been done by you originally? A. No.

Q. This was in addition to what you had already done under your previous contract? A. Yes.

966 Q. You mentioned there an additional coat on trim. Is that right? A. Additional coat of paint on trim, yes, $10,000.

Q. Now, had you during your previous work put the final coat on the trim? A. No.

Q. You had not? A. No.

Q. What is the "trim"? A. The trim is the iron bucks, the doors, the inside of windows, spare iron work, picture moldings, and so forth.

Q. How many coats of paint were called for by the request of Mr. Lukach for estimates? A. Well, I would have to refer to that specification.

Q. (Handing witness paper.) A. On the kala- 967
mein and the hollow metal doors and steel bucks this specification required one coat of lead and oil paint, and a final coat of enamel.

On the radiator enclosures, which, of course, we take in as trim, this specification required one coat of lead and oil paint, and one coat of enamel.

On the metal windows—metal window-frames, sash, and stools, they were to be painted on the inside with one coat of lead and oil and one coat of enamel.

On the ornamental miscellaneous iron, the exterior of steel casement doors and windows, exposed pipes in closets, and all elevator door- 968
saddles above first floor; and then a number of other items to be painted with two coats of lead and oil paint.

Q. I understand you to have testified, Mr. Gladstone, that all except the final coat of paint had been placed on this job—all except the final coat? A. Generally, yes.

Q. Now, how much would it have cost to put on the final coat in accordance with the specifications? A. The allowance that we had in our contract would have covered it—a total of about $12,000-odd. 969

Q. But if you had been called in independently, instead of in accordance with the contract with the Central Park Properties, would the cost have been the same or a little higher or a little lower? A. The cost would have been the same.

Q. Now, do you know whether or not there is any custom in the City of New York regarding the reserving of the last or final coat of paint in apartments until some period later than the doing of the first coats of paint?

970 Mr. Schenck: I object to this on the ground that it is irrevelant, your Honor.

The Court: I sustain the objection.

Mr. Murray: Exception.

Q. Let me see that, now. A. Yes (handing counsel).

Q. In your talks with Mr. Lukach, did he make any observation or complaint to you that the job which you had done was not a first quality job? A. He did not.

Mr. Schenck: I object to that on the ground—

971 The Court: Sustained.

Q. Did he complain that the job which you had done was not in accordance with the specifications? A. He did not.

Mr. Schenck: I object to that.

The Court: Sustained.

Mr. Murray: Exception. That is all, Mr. Gladstone.

Cross examination by Mr. Schenck.

Q. Mr. Gladstone, I did not quite catch your reference to the 3rd of December. I think you
972 stated that the 3rd of December was the last day on which you had any record of any work being done under your contract? A. That is right.

Q. And what, speaking very generally, was that record? Was it your daily progress report or something of that kind? A. That particular one was a weekly summary of work completed.

Q. Yes? A. Up until that particular period.

Q. When did you start this painting job, Mr. Gladstone? A. July 11, 1930.

Q. I note by the contract which has been offered in evidence that your payment was to be 50 per cent. cash, and 50 per cent. in four months notes —all renewal notes to bear interest, and all notes to bear the endorsement of A. E. Lefcourt. Did you receive 50 per cent. cash on the execution of the contract? A. We received our moneys in accordance with the contract regularly. They were progress payments. 973

Q. But I ask did you receive 50 per cent. cash on the execution of the contract? A. Did we get all our payments, do you mean?

Q. No. I am asking you whether you received 50 per cent. cash on the execution of the contract? A. Well, I have here a statement of December 31, 1930, which shows that we received on account cash and notes $36,000. That is— 974

The Court (Interposing): The question is: when you signed the contract did you get 50 per cent. of the contract price in cash?

The Witness: At the time of the signing of the contract, your Honor?

The Court: Yes.

The Witness: No.

Q. And the statement of what you did receive is a statement that you received part of your payment in notes? A. That is right. 975

Q. And how much in notes? A. There is a total here of $36,000, and that is 50 per cent. in notes— $18,000 notes, and $18,000 cash.

Q. And when did you receive the notes—the date of the notes? A. Well, at the same time we received the check payments—cash payments— they were progress payments, and I do not recall whether it was once a month or once every two months as the work progressed.

976 Q. Does that statement that you have in your hand now show the details as to times and amounts of payment? A. No; it is just a statement made as of December 31.

Q. And for what purpose was that statement made? A. This was submitted to the Central Park Properties, showing the standing of the account at that particular date.

Q. May I see that? A. Yes, sure (handing counsel).

Q. So that on the 31st of December, 1930, according to this statement, there was a balance due to you of $8,832? A. On the open account, yes.

977 Q. Well, when you say "on the open account" you mean on this particular contract? A. What I really mean is this: that there was $8,800 due us, but there were a lot of notes that were not as yet or had not as yet matured.

Q. What was the purpose, if you had notes which had not yet matured, of your rendering a financial statement to Central Park Properties? A. Oh, we do that every month.

Q. And you have no record there to show when you received these notes or what their term of maturity was? A. No, I have not, not here.

978 Q. But so far as the payments under this contract were concerned, the payments were made on the due dates, and in accordance with the contract? A. On the due dates and in accordance with the contract, yes.

Q. And so you received your full payment under this contract? A. No, sir.

Q. That is, the notes on maturity were not met? A. The notes and the balance of the open account was never met—a total of some $24,000 or $25,000.

Q. I see. Now, I am awfully stupid on these figures and financial things, among others; but I

understood you to say that everything was met except the open account, and that the open account was in notes? A. No. I think what I said was that we had received on account in cash and notes up to this date $36,000, of which $18,000 were notes, and $18,000 was cash. Our total indebtedness up to that date was $44,832.50, which was due us on that date; so that there still remained a balance of $8,832 due on that date, which we did not receive. That is, of course, in addition to the $18,000 payment of notes, totalling about $26,000-odd. I don't know whether we got $3,000 of that. 979

Q. But you have no daily reports of any work done under this contract between the 3rd of December and the 10th of December, when you say the last work was done? A. I will tell you: I have these reports here. I have never looked them over; that is, I have never looked them over since the completion of the job; and if you will just give me a moment, I will see whether we have any. (After examining papers.) I have here a location report, as we call it, of December 4, 1930, showing the number of men on the job on that particular date. 980

Q. How many men? A. And where they were working; and also one of the 5th of December and their locations. 981

Q. And now many on each of those dates? A. On the 4th there were 21 men.

Q. And how many on the fifth? A. On the 5th we had eight men. There may be some more sheets here. I don't know.

Q. I do not want to take too much time about it, but I am a little interested about the course of your job from the 5th on. By the way, did you

982 know anything about a building loan that the Prudence Company was making to the Central Park Properties? A. No, sir, I had no knowledge of that.

Q. Was any money due you on the 5th of December? A. Oh, yes.

Q. And were you pressing the Central Park Properties for payment? A. We were insisting upon getting our payments when they were due.

Q. Did you know that Central Park Properties had received some $300,000 on the 5th of December? A. We did not know that, no.

Q. Now, I understand you to say that your esti-
983 mate of putting a final coat of paint on this job was about $12,000? A. That was the allowance in our contract for the omission—

Q. No. I think you said that in answer to Mr. Murray's question. A. That the application of the final coat of paint would cost around—whatever it was—$12,000-odd, in accordance with the allowance that we made in our original contract.

Q. But when you examined the building for the purpose of making your estimate to Mr. Lukach, of course you realized that it was in such a state that a final coat of paint would not be adequate, did you not? A. No.

984 Q. I show you this letter of the 11th of April, 1931, and ask you if you wrote that letter to Mr. Lukach (handing witness)? A. Yes; I have a copy of it right here. That is right.

Mr. Schenck: I offer that in evidence (handing paper to Mr. Murray.)

(Marked Plaintiff's Exhibit No. 107.)

Q. Have you got the painting specifications that were the basis of your original contract? A. Yes.

Q. If you will point out to me—you said on direct examination that your contract called for sizing and kalsomining the ceilings in accordance with the specifications. Will you point out to me upon that specification that you have there, the provision which called for kalsomining and sizing the ceilings? A. It is addenda No. 2 to the painting specification. 985

Q. Is there any date to that addenda? A. I am looking for it now. There is no date on it, no. Paragraph 6 says "Ceiling shall be given one coat of gum size, and one coat of kalsomine, instead of being painted as described."

Q. May I see that a moment, please? A. Yes (handing paper to Mr. Schenck). 986

Q. Can you tell me what this yellow letter is, which has Central Park Properties, with some initial, which I can not make out—and "7/9/30"—can you tell us what those initials are? A. I really don't know. It is Chinese to me.

Q. You also said something—you made some reference in your direct examination in regard to unit prices which were the basis of your estimate. What were those unit prices? Are they referred to in your contract? A. There is a list of unit prices in the contract, yes.

Q. Will you please state those? A. Units and prices are as follows: 987

1. Three coats of lead and oil, per square foot—and there is a column for "Addition" and a column for "Deduction". The first item is an addition of .0375 cents; deduction .0325 cents.

Now Item 2: Two coats lead and oil, per square foot: addition two and three-quarter cents, deduction two and three-eighth cents.

988 3. One coat of size, and two coats of flat wall paint, the last coat stippled, per square foot, three and one-half cents addition; three cents deduction.

4. One coat of size and two coats of flat wall paint without stippling, per square foot, three cents addition; two and three-quarter cents deduction.

5. One coat of size and two coats of lead and oil paint, per square foot—

Q. (Interposing.) Are there many of these? A. There are sixteen different items.

989

Mr. Schenck: All right. I do not want all of those read. Here is your financial statement (handing witness). That is all.

Redirect examination by Mr. Murray.

Q. This letter of April 13, 1931, Plaintiff's Exhibit No. 107, Mr. Gladstone, in which you refer to the adhesive qualities of the paint surface of the plaster, and mention the application of a treatment that will cause the finishing cost of paint to adhere properly, what is that treatment which is applied in such cases? A. It is a size coat.

990 Q. A size coat? A. Yes.

Q. And what does that consist of? A. Well, there is usually a glue size—glue and water.

Q. And how much would it cost for the application of that size treatment to that job? A. To that particular job?

Q. To that particular job? A. Roughly, I would say about $1,200.

Mr. Murray: That is all.

Mr. Schenck: That is all.

HENRY SWITZER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows: 991

Direct examination by Mr. Murray.

Q. Mr. Switzer, what is your business? A. General estimator and superintendent.

Q. And with whom were you connected in 1931? A. With Edward V. Keeler, Inc.

Q. And are you the gentleman who went from Keeler, Inc. to this job at 59th Street? A. I was.

Q. And are you the gentleman who saw Mr. Lukach there? A. I did.

Q. Will you describe what dealings you had with Mr. Lukach, and what you did in respect of that job? A. I saw Mr. Lukach, and told him my mission, and requested a set of plans and specifications, to make a detailed estimate as to the cost of finishing this building. 992

Q. Did you have before you at that time any information from the Prudence Company as to incompletions? A. I did not. I got the data of what had to be done in the building for completion only about four or five days later.

Q. And who sent them to you? A. I received them from Mr. Lukach.

Q. And did you thereafter examine the building with these claimed incompletion items before you? A. I did. 993

Q. And at the time you made your inspection had some of the claimed incomplete items been completed? Had some of the work been done? A. A good deal of it was done when I stepped in.

Q. In other words, at the time you were there Mr. Lukach told you of certain items which had been done? A. He did.

994 Q. And about when was it that you went there first? A. May 25, 1931.

Q. Did he, Mr. Lukach, show you any contracts which assumed to have covered certain work done there? A. No, I am not particular. A few questions arose, and he proved what it was.

Q. Now, when you were there was your attention called by Mr. Lukach to any missing stools or trim? A. I was told by Mr. Lukach that a certain number of stools were missing at the time, but when I got into the building they were all on —and I was told the number of the same.

995 Q. In other words, certain stools were claimed to have been put on? A. Yes, sir.

Q. Did you see the elevators? A. I went up and down with them.

Q. Were they operating, in your opinion, satisfactorily? A. They were, and the men—I presume they were Otis men—were working on them, to ease them up and regulate them, as is usually done.

Q. Did you examine the elevator pits for water? A. I did not.

Q. Do you recall whether there was any claim at that time that the elevator pits needed to be water-

996 proofed? A. I was so informed by Mr. Lukach, yes.

Q. But you did not go down to the pits? A. No, I did not.

Q. Now, do you know whether the waterproofing had been done at that time? A. I simply took Mr. Lukach's word.

Q. Did you examine the painting? A. The painting? What do you mean by "examine the painting"?

Q. Did you examine what painting had been done in the building, to determine how much had been done? A. I went through every room in the house, from top to bottom, and saw the painting was in good condition, ready for a final coat, excepting some of the rooms where the wall moldings, the panelling, had been taken out, and that looked out of place, because of all the spots and patching and so on. 997

Q. How long has your experience been, Mr. Switzer, in connection with building construction? A. My experience?

Q. Yes. A. Thirty-five years.

Q. And during that time have you had occasion to examine and to apply paint? A. I never applied paint myself, but painters were under my supervision. 998

Q. From your examination of the walls could you tell how many coats of paint had already been placed on there? A. I could see there was two coats on there.

Q. Was there anything about the appearance of those coats of paint—I will withdraw that. From your examination of the walls, could you determine whether or not the paint that was applied had been first quality paint? A. The paint looked good to me. I don't know the analysis of the substance of the paint. 999

Q. And applying the same quality of paint as a third coat to those walls, how much would you say the reasonable cost thereof would be? A. Governing myself according to the contract of the painter, I should say between $12,000 and $15,000.

The Court: The contract of what painter?

The Witness: The painter that had the job—the Globe.

1000 Q. Did you see, Mr. Switzer, any cement floors in the building which required levelling? A. I could not say.

Mr. Murray: The defendants contest the values of Schedule A only in respect of painting and elevators; so that is all of this witness—Oh, just one more question.

Q. Do you remember seeing the ice-compressor in the basement? A. I would not say for sure. It is three years ago when I was in there.

Mr. Murray: That is all.

1001 Mr. Schenck: I think my work is considerably shortened by the statement of Mr. Murray.

The Court: Yes, that is a fair statement, and in accordance with his concession.

Mr. Schenck: Yes.

Cross examination by Mr. Schenck.

Q. Mr. Switzer, you said that when you went to the job you told Mr. Lukach your mission? A. Yes.

Q. And what was your mission? A. To go up to the building and make an estimate of the cost

1002 to complete the job.

Q. And you gave the date when you went there as the 25th of May? A. Correct.

Q. When did you first hear about this matter? A. On the 23rd, two days previously.

Q. Two days previously to that? A. Yes.

Q. Did you understand that this estimate that you were to make was for the purpose of Keeler & Company completing the job? A. No, sir.

Q. You knew that it was not for that purpose? A. No, sir; we are not in that line of business.

Q. What is that? A. I say, we are not in that line of business. 1003

Q. I see. You do not do the work? A. No.

Q. On which you make estimates? A. No.

Q. You make estimates so that others can do the work on those estimates? A. As a rule, we are asked from surety people and people in the same line of business—in the building line—to help them along, when they get to a point of quantity survey and the pricing of it. That is my mission.

Q. I am very glad that you are so frank with me. You do quite a lot of work for surety companies? A. Not alone for surety companies, but for builders or anyone who comes in. I would do 1004 an estimate for you, if you came in.

Q. Surely. But I mean that the estimates that you make are made not for the purpose of completing any work? A. No, sir.

Q. But for the purpose of advising people who are curious or interested in knowing— A. I would not say "curious." We want to give them an honest price on the work.

Q. Yes, and you understood that your employer had been asked by these two surety companies to make an investigation of the state of this job, and to give an estimate as to how much it would cost to 1005 complete the work? A. That is right.

Q. Now, were you asked to ascertain whether or not the building, as it stood, was in strict accordance with the plans and specifications? A. Well, that is part of my mission, but not exactly. I only want to get at the cost of the finished job, and when I want to see my way through, certainly I have got to have plans and specifications to enlighten me.

1006 Q. Yes. There, too, you have been very frank. It was the completion of this job, rather than ascertaining whether it was in accordance with the plans and specifications— A. That is all I was interested in—the price of the work.

Q. You went there on the 25th of May? A. Yes.

Q. I wish you would give me the extent of your examination? By the way, did you do all of this yourself personally or did you have some assistance? A. No; all personally.

Q. All yourself? A. Yes.

Q. And did you take with you the plans and specifications? A. I had them with me, yes.

1007 Q. And in estimating what was required to complete this job, did you, in each instance, check up with the plans and specifications to see what was called for? A. No; as a rule a man goes through a building and makes his notes, and then goes to his office and looks over his plans and specifications, and gets a result on paper.

Q. You made some reference to this painting contract. Were you given a copy of the painting contract? A. I had papers pertaining to the whole building, and I found that contract in them.

Mr. Schenck: And that was this Gladstone
1008 contract which has been offered in evidence here. May I have that?

(Paper handed to Mr. Schenck by the Clerk.)

Q. You were given this blue-covered contract of the Globe Painting and Decorating Company, which has been marked Defendants' Exhibit J, were you (handing witness)? That is one of the papers that you had? A. I could not say yes or no to that. It is so long ago.

Q. You don't remember that? A. No. 1009

Q. All right. How long did this examination of yours take? A. It took me about—had to go there on and off, with other work, you know, that I have to do—

Q. (Interposing.) Yes. A. So I could not spend the whole week on it. I presume it took me about the extent of six weeks before I got through with that building, in the building.

Q. Speaking generally, now, and not tying you down to hours, about how many days were you making your examination? A. It took me, to make that examination, about, say, 30 working days.

Q. Of course, this was quite a complicated job, 1010 was it not? A. Not for me.

Q. Well, it involved a lot of details? A. Not so very much.

Q. At any rate, it involved 30 working days approximately? A. Well, that is all right, because that is the extension of the job—200 feet by 200, and 44 stories high. That makes a lot of difference.

The Court: The witness means it may be a lengthy job, but not intricate or complicated?

The Witness: That is the idea. 1011

Q. You did not want your investigations to be left merely to your memory, did you? A. No.

Q. So you made a written report of the result of your investigations? A. I did.

Q. Have you got that here? A. I believe we have.

Q. Could I see that? A. My papers are with Mr. Murray. I don't know if he has got it or not.

1012 Mr. Murray: I would have to look for it; but I do not see the propriety anyway, your Honor, in view of the fact that there are only two questions involved in this witness's testimony—and that is the elevators and the painting.

Mr. Schenck: That is exactly what I am interested in.

Mr. Murray: I will be glad to show him what Mr. Switzer said in those respects.

Mr. Schenck: Am I to understand that you refuse to show me what Mr. Switzer said in other respects—because I am interested to

1013 know whether or not Mr. Switzer reported to you that it would require $170,000 to complete, and that there were $230,000 of variations? Of course, you know that is what I am interested in.

Mr. Murray: Well, I do not think that is a proper request.

Mr. Schenck: I press my request, your Honor.

The Court: Well, I can not order the production of the instrument for general purposes. After all, the direct examination was

1014 limited in its scope; and your cross examination should be similarly limited, unless you want to make the witness your own. And as to a report made, after all that is more or less privileged—a survey from an agent to a principal.

Mr. Schenck I quite realize that, and, of course, these questions are never pressed to their ultimate conclusion. I realize the privileged character of it; but I also realize, since Mr. Murray presses that privilege, that I am

entitled to the inference that that report contains matters against his own interest; and that is all I am desirous of having. 1015

Mr. Murray: I do not think I should be put in this position, your Honor. If Mr. Schenck wishes to make Mr. Switzer his own witness, Mr. Switzer can produce his report for him; but I do not want to be—

Mr. Schenck: I am not making Mr. Switzer my own witness. I am asking him for a written report which he made at the time to his employer—the defendants—in relation to the state of this job.

The Court: I shall not order the production of the instrument—save for those paragraphs that relate to such matters as the witness has specifically testified to. But, at the same time, I will call the attention of counsel to the fact that inevitably there are certain inferences to be drawn from a reluctance to produce the report. 1016

Mr. Murray: If the report is produced, then I shall be—

The Court: It does not mean that the production of the report would permit Mr. Schenck to go into cross examination on matters not covered in the direct examination. If he desired so to do, then he would make the witness his own as to those matters. 1017

Mr. Murray: But if the report is produced, then it will be necessary for me to go into considerable redirect examination, in order to have him explain the items which appear in there.

The Court: That may be; but I have given my ruling as I see it.

1018 Mr. Schenck: That is all, Mr. Switzer.

(Witness excused)

The Court: We will have the next witness sworn, and go on for a few minutes.

Mr. Murray: I thought there was something decided about this report of Mr. Switzer's, your Honor? I was directed to produce the report, so far as—

The Court: I made no direction.

ROBERT P. BANFIELD, called as a witness on be-
1019 half of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Banfield, what is your business? A. Construction engineer.

Q. Louder, please. A. Construction engineer.

Q. And with whom were you connected in 1929 and 1930? A. A. E. Lefcourt Realty Holdings.

Q. And in your connection with that organization did you have anything to do with the building at 59th Street, known as the Essex House? A. I did.

1020 Q. What was your connection with the Lefcourt organization? A. General superintendent of construction.

Q. And what duties did that office or position entail? A. It entailed supervision of the erection of all of Mr. Lefcourt's buildings from the time the property was bought and it was decided to build a building upon it.

Q. And after the building was started, what were your duties in connection therewith? A.

Still the same—to supervision its construction until completion. 1021

Q. That is, from the time the property was purchased until the building was completed, you had charge of it? A. Yes, sir.

Q. General charge? A. Yes, sir.

Q. Did you have other subordinates under you? A. I did.

Q. Sometimes was there more than one building being constructed at the same time? A. There were.

Q. Do you know whether or do you remember whether there was any other building being constructed at the same time that this particular one was being constructed? A. There were. 1022

Q. How many? A. Four others.

Q. How many buildings in all had been erected by the Lefcourt organization during your connection with it? A. Between fourteen and sixteen buildings. I can not state just exactly.

Q. And you were familiar with the erection of all of those buildings? A. I was.

Q. And what type buildings were they? A. Loft buildings, office buildings, and apartment hotels.

Q. How many of those buildings were in New York City? A. All but one. 1023

Q. And where was that one? A. In Newark.

Q. And is that the Newark job of which Mr. Grad spoke the other day? A. It is.

Q. Now, when did you first come into contact with anything regarding this particular job? A. When Mr. Haas brought me a set of plans and specifications, put them on my desk, and told me that they had decided to build a building of that type at 59th Street.

1024 Q. And when was that? A. Some time in the fall of 1929.

Q. Do you know whether these plans and specifications are the same—will you give me the original plans, please?

Mr. Judd: Yes (handing papers to Mr. Murray).

Q. Would you say these were the plans which were shown to you at that time (handing witness)?

Mr. Murray: That is Plaintiff's Exhibit—

Mr. Judd: Five.

1025 Mr. Murray: Plaintiff's Exhibit No. 5.

The Court: Is there any doubt about it?

The Witness: They are (handing papers to Mr. Murray).

Q. And are these the specifications (handing witness)? A. They are.

Mr. Judd: Referring to—

Mr. Murray: Plaintiff's Exhibit No. 4.

Q. Do you know whether they were handed to you at the same time specifications similar to those (handing witness)?

1026 Mr. Judd: Referring to Exhibits 98, 99, 100, 101, and 102.

Mr. Murray: Yes. Thank you.

A. I can testify that I have seen these specifications or similar ones before, but I can not testify that they were handed to me at the time I received that particular specification there (indicating).

Q. Have you any recollection—independent recollection now as to whether or not these were

the only specifications handed to you, or whether possibly specifications similar to those were handed to you? A. To the best of my recollection, I received the bound specifications, and the plans which I just looked at. 1027

Q. Mr. Banfield, you testified late yesterday that certain plans and specifications were handed to you upon which a building was to be erected. Will you proceed to state what you first did? A. I looked the plans and specifications over for the purpose of ascertaining what kind and type and so forth of building it was; also with reference to whether the equipment and the building in general was in keeping with the type of buildings that Mr. Lefcourt was in the habit of erecting. 1028

Q. Did you have an organization who worked with you on this project? A. I did.

Q. Did you hire any men for this project? A. I did.

Q. Who in particular came into the organization at that time who had not been in it before? A. Mr. Lush.

Q. Do you know whether Mr. Lush had any previous contract with such a project for this plot of land? A. He did.

Q. Do you know whether he had worked with Mr. Grad originally on the specifications, before the Lefcourt organization came into the matter? A. Well, at the time that I took these plans and specifications I discussed with Mr. Haas as to would we handle the job in the usual way and the usual procedure as all our other jobs had been handled, and Mr. Haas— 1029

Mr. Schenck: I think I must object to conversations among different people in the organization.

1030 The Court: Yes.

Q. At any rate, Mr. Lush was employed; is that correct? A. He was.

Q. And thereafter were there conferences regarding the drawing of detailed specifications? A. There were.

Q. What people entered into these conferences? A. Mr. Haas and the Engineering and Inspection Department.

Q. Were there any outside people who entered into the discussions? A. Mr. Grad and Mr. Kingsley.

1031 Q. Had Mr. Kingsley been retained as mechanical engineer for this job? A. He had.

Q. During the progress of the project did you at any time see anybody from The Prudence Company? A. I did.

Q. And whom did you see? A. Mr. Walters.

Q. Who was Mr. Walters? A. He was in charge of the Engineering and Inspection Department for The Prudence Company.

Mr. Schenck: I think I must object to that, as a conclusion.

The Court: Yes, he can say what he saw Mr. Walters do.

1032 Q. Did you see any letters which Mr. Walters had written to the Central Park Properties? A. I did.

Q. And those letters were on Prudence stationery? A. They were.

Q. And how did Mr. Walters designate himself? A. As head of the Engineering and Inspection Department.

Q. Of The Prudence Company? A. Of The Prudence Company.

Q. In preparing for the equipment to go into 1033
the building will you state generally what was done as respects obtaining bids or examining other projects in order to make contracts? A. First we had to decide whether the particular specification and the plan to which that particular specification applied was what we wanted to go ahead with, and to that end, why, we held conferences and discussions and visited other jobs, that is other buildings in the City to make inspections and comparisons and so forth.

Q. As to the excavation item, did you follow the plans in every respect so far as excavation was concerned? A. No, sir. 1034

Q. In what respect didn't you follow the plans? A. Well, upon investigation we found that the part of the cellar allotted to the kitchen and kitchen equipment did not have sufficient headroom for the installation of sufficient ventilation; so we decided that we would have to make that portion of the cellar deeper.

Q. In other words, if you had proceeded on the original plan the kitchen would not in your opinion have been a proper kitchen?

Mr. Schenck: I object.

A. That is correct. 1035

The Court: Sustained.

Mr. Murray: Exception.

Q. What then did you do as regards the excavation?

Mr. Schenck: I object to this as being irrelevant to this controversy.

The Court: I do not see what this has to do with the case at all. Why don't you get down to the matters at issue?

Discussion

1036 Mr. Murray: It has this to do with it, your Honor—that, as I have indicated a number of times before, The Prudence Company has picked out certain changes, as I might call them, from the original specifications, where probably a little less money was spent by the Central Park Properties. I offer to prove that in many other respects the Central Park Properties improved upon the plans which were originally submitted, so as to increase the cost of the building immeasurably above what the original cost on the original plans would have been, and that by reason of these
1037 changes, on which The Prudence Company does not claim, a much better building was erected than as contemplated by the original plans.

(Argument of counsel has been abbreviated.)

The Court: I think it is a defense that should have been set up specially.

Mr. Murray: Well, your Honor, they claim loss and damage; and all they are entitled to, under the bond, is loss and damage sustained by reason of the principal's failure to comply
1038 with the contract. When we deny that they sustained loss and damage, the whole thing is at issue, in my opinion.

The Court: But I do not think you can prove, under a general denial, a defense such as you seek here to establish,—giving proof of departures from the specifications, and contending that those departures were for the benefit of the building. How can the plaintiff ever know what he has got to meet in the case?

Mr. Murray: I do not think the mere fact 1039
that the plaintiff alleges and even proves substitutions in this building proves any damage whatsoever. I think the plaintiff should have gone further, and said that because of these, therefore, the security which they were relying upon was materially lessened.

The Court: Well, that is a different matter.

Mr. Murray: And they have not offered that proof.

The Court: Yes, they have shown in each instance that there is a difference in value between that which was specified and that 1040
which was substituted.

Mr. Murray: But there has been no proof offered to show that the building itself was not as good security as they bargained for.

The Court: I think there is prima facie proof which would justify a finding in that respect. However, we are discussing something that is generic to the case, and not specific as to what is now before me with this witness. I shall have to rule on the question that is put and is objected to; so we will proceed along that line.

Mr. Murray: Exception. Will you read 1041
the last question, now?

(Question read, as follows):

"Q. What, then, did you do as regards excavation?"

Mr. Schenck: And I am objecting to that question.

The Court: I sustain the objection.

Mr. Murray: Exception, please.

The Court: Yes.

Mr. Murray: Your Honor, I have a number of witnesses in addition to Mr. Banfield, whose testimony I had hoped to be able to

1042 introduce to show the difference in value between the building which is now up there and the building which it would have been if the plans and specifications had been followed in detail.

I make the offer of proof; and it possibly might simplify matters if your Honor were to rule on that offer, instead of my asking Mr. Banfield questions—

The Court (Interposing): No, I will not do that. I will take each matter up as it comes along.

1043 Q. Were there, Mr. Banfield, instances where the material furnished and the equipment furnished and the work done on this building was in addition to or more valuable than the work and material which would have been necessary in order to complete the building according to the original plans and specifications? A. There were.

Mr. Schenck: I object to the question on the grounds that it is irrelevant, immaterial and incompetent, involving conclusions and alternative features.

The Court: I sustain the objection.

Mr. Murray: Exception.

1044 The Court: If you want to ask him what additions were made beyond that which was called for by the specifications, that is a proper question.

Q. What additional work and material and equipment was furnished in this building in addition to what was provided by the original plans and specifications, if you know, Mr. Banfield?

Mr. Schenck: I think I shall object to that question on the ground that it is irrelevant, and not within the pleadings.

The Court: I am not sure that your objection is not good, but something may develop. At any rate, I will overrule the objection. 1045

Mr. Schenck: Your Honor will grant me an exception?

The Court: Yes.

A. I have here a list of some of the things: We installed copper radiators throughout the building, where cast iron phantom type radiators were originally specified, at an approximate cost of $20,000.

Mr. Schenck: The question does not call for the cost, and I do not think we are bound by that. 1046

The Court: No.

Mr. Schenck: And I do not think we are bound by the approximations of the witness in regard to it.

The Court: No.

Q. What was the additional cost caused by the installation of copper radiators?

Mr. Schenck: I object to that on the ground that it is irrelevant, immaterial, and that the witness is not competent to answer.

The Court: I will sustain the objection. 1047

Mr. Murray: Exception.

Q. What other item is there, Mr. Banfield? A. In every instance throughout the building where there were set-backs and the original specifications called for slag roof, we put quarry tile on those roofs; we put casement windows—that is, windows opening out similar to doors, in place of double hung windows. We put low radiators, with marble tops on them, forming steps, so that those

1048 terrances became available to the tenants of those respective apartments.

Q. What was the additional cost involved in doing that work?

Mr. Schenck: I make the same objection, your Honor.

The Court: Sustained.

Mr. Murray: Exception.

Q. What other item, Mr. Banfield? A. We increased the depth of the area used by the kitchen and refrigerating equipment, to a depth—an added depth of three feet.

1049 Q. And what was involved in that change? A. General excavation, additional concrete and brick work for the sustaining walls, and additional steel, and additional ventilation—and when I say "ventilation" I mean duct work, metal work and so forth.

Q. And the additional depth which was excavated was three feet, is that right? A. Three feet.

Q. And was that rock excavation? A. It was.

Q. And what was the cost of that additional work?

Mr. Schenck: I object to that on the same

1050 grounds.

The Court: Sustained.

Mr. Murray: Exception.

A. We made changes in the elevator equipment, putting in a better signal system and so forth.

Q. And what was the additional cost of that?

Mr. Schenck: Same objection.

The Court: Sustained.

Mr. Murray: Exception.

A. We installed a vertical high-tension system throughout the building.

Q. And what is a vertical high-tension system? 1051
A. Ordinarily in a high-tension system there is a transformer vault either in the cellar or in some lower portion of the building, by which they transfer this high-tension current into low-tension current. From there on it is distributed throughout the building as low-tension current. In other words, the consumer pays for the line losses for the complete height of the building; and the system which we installed,—we had a high-tension system throughout the building, and we fireproofed vaults at four different levels in the building,—pipes encased in concrete to carry these high-tension lines through the building, and dis- 1052
tribute this current from four different points or four different elevations in the building; thereby minimizing the loss of current.

Q. What was the value of that additional work? A. About $30,000.

Mr. Murray: Do not answer these questions until after counsel has had an opportunity to object and the Court an opportunity to rule.

Mr. Schenck: I object to that, your Honor.

The Court: Sustained.

Mr. Murray: Exception. 1053

Q. In any instance where I ask what the value was, do not answer the question until you have heard what the ruling is. A. We installed soundproofing around all elevator shafts, wherever they came up against living quarters.

Q. And that was not provided by the original specifications? A. All these that I have so far enumerated were not required by the original specifications.

1054 Q. And what was the cost of that work?

Mr. Schenck: I make the same objection, your Honor.

The Court: Sustained.

Mr. Murray: Exception.

A. We used four by four tile—wall tile throughout all bath rooms in the apartments of the building, instead of a three by six tile specified.

Q. And what was the value of that extra work?

Mr. Schenck: Same objection.

The Court: Sustained.

Mr. Murray: Exception.

1055

A. We had to cinder-fill all ground floors and arches throughout the building.

Q. What did the specifications provide, if anything, regarding cinder-fill? A. They specified originally what is known as a monolithic finish; that is, the cement finish is applied directly to the arch.

Q. What was the value of that additional work?

Mr. Schenck: I make the some objection.

The Court: Sustained.

Mr. Murray: Exception.

1056 The Witness: We installed a steel house tank on the roof of the building, in place of a wooden tank which was originally specified; and we enclosed this steel house tank in a brick structure, the outside of which was the same architecturally as the rest of the building.

Q. What was the value of that extra work?

Mr. Schenck: I make the same objection.

The Court: Sustained.

Mr. Murray: Exception. 1057

A. We increased the size of the incinerator from that specified.

Q. And what was the cost of that?

Mr. Schenck: I make the same objection.

The Court: Sustained.

Mr. Murray: Exception.

A. We installed a pressure system of indirect heating over the entrance of the 59th Street side of the building.

Q. And what would be the effect of that, Mr. Banfield? A. The ordinary radiation provided 1058
did not provide for any circulation, and with the type of ventilating system that was installed in certain parts of the first floor and the basement it would cause a slight vacuum within the first floor of the building; so that if you opened the doors, windows and so forth, you would get a draft even though there was no wind outside. By the installation of this apparatus we eliminated that slight vacuum.

Q. What was the value of that additional work?

Mr. Schenck: I make the same objection.

The Court: Sustained.

Mr. Murray: Exception. 1059

Q. Now, was there any item as regards steel? A. There was.

Q. And what is that item? A. At most of the corners of the building we increased the size of the living rooms of the apartments, which necessitated an increase of about 500 tons of steel.

Q. What was the additional cost—the additional value of that change?

Mr. Schenck: I make the same objection.

1060 The Court: Sustained.

Mr. Murray: Exception.

The Court: I assume, Mr. Murray, that none of these changes that Mr. Banfield has referred to—that none of these was referred to the Prudence Company or any written authority given with respect to them?

Mr. Murray: I am not prepared to say, your Honor, whether or not these particular items were approved.

Mr. Schenck: I think I should state that they are all news to me, and that my investigation has not discovered any single one of
1061 these items. I am merely speaking personally myself. They come to me as news at the present moment in the case.

Mr. Murray: I am not prepared to say, your Honor, that these changes were not known to the Prudence Company, or whether the approval of them was in writing or otherwise.

The Court: Obviously, you can see the reason for my question: If approval had been obtained, then the value of the work done would become important, perhaps.

1062 Mr. Murray: I have not gone into that question. The indications are that some, at least, of them were approved but I am not in position to state definitely on that right now.

The Court: I will say this, then, for your benefit: That if you give proof of such approval, then you may offer proof as to the value of changes which were approved.

Mr. Murray: I may be able to do that with another witness.

Q. How many years' experience have you had, Mr. Banfield, in the construction business? A. About twenty-five years. 1063

Q. Now, assuming that there was about $100,000 worth of work to be done to make this building ready for occupancy, and that by performing that $100,000 worth of work the building would be complete, can you state whether or not the building, with these completed items in it, was a building of a higher value than the building which would have been erected in strict accordance with the plans and specifications? A. It would.

Mr. Schenck: I object to that on the ground that it is irrelevant, and also incompetent. 1064

The Court: Sustained.

Mr. Murray: Exception.

Q. Have you seen the building since its completion? A. I have.

Q. And after having seen the building can you state whether or not the building as now constituted, leaving out of consideration any changes in the lobby floor or basement, is a building of greater value than the building which would have been erected if the original plans and specifications had been complied with strictly? 1065

Mr. Schenck: I object to that on the same grounds.

The Court: Sustained.

Mr. Murray: Exception. Now, in connection, your Honor, with this question which we have been discussing, as to changes, I again call your attention to Article 15 of the general conditions—

1066 The Court (Interposing): Let me see it.

Mr. Murray: Yes (handing bound volume to the Court).

The Court: But there is this following clause: "That no extra work or change shall be made unless in pursuance of a written order from the owner, signed or countersigned by the architect, or a written order from the architect stating that the owner has authorized the extra work or change; and no claim for an addition to the contract sum shall be valid unless so ordered."

1067 Q. Mr. Banfield, what was included in each contract made by Central Park Properties with the several contractors?

Mr. Schenck: I object—

Q. (Continuing.) What was the nature of the papers constituting the contract?

Mr. Schenck: I think I must object to that. I do not see how the agreement that Central Park Properties made with contractors or sub-contractors—

The Court (Interposing): It might have this authority in it that is referred to in that
1068 paragraph. Overruled.

A. One was that the general agreement clause of the specifications was part of their contract.

Q. Was there included in their contract any specification for the doing of the work or any reference to a specification for the doing of the work? A. There was. A specification and a plan became part of their contract. They must sign that with the contract.

Q. I show you now Defendants' Exhibit G for Identification, and ask you whether the contractor for heating and ventilating approved the specification as the basis for the work to be done by him (handing witness)? A. He did. 1069

Mr. Schenck: I move to strike out the answer. I do not see the relevancy of the question. Possibly it is because I do not remember the exhibit, but what the contractor approved and who was intended by the word "contractor" in reference to this exhibit, I do not know.

The Court: Will you read the question? 1070
(Question read.)

The Court: I sustain the objection.

Mr. Murray: Exception.

Q. In every case was there a specification made a part of the contractor's contract? A. There was.

Mr. Schenck: I move to strike out "was made a part of the contractor's contract."

The Court: It is not quite clear to me what you mean.

Q. Were there different specifications drawn for each contractor? A. There was. 1071

The Court: Each sub-contractor.

Q. Each sub-contractor. A. There was.

Q. And was the specification for each particular work made a part of the contract for the doing of that work? A. There was.

Q. Do you know by whom the specifications were prepared, the several specifications were pre-

1072 pared, which went into and became a part of the several contracts?

Mr. Schenck: Sub-contracts.

The Court: Sub-contracts.

A. Frank Grad and Mr. Kingsley.

Q. Was every specification used in the doing of this work approved by Mr. Grad?

Mr. Schenck: I think I must object to that. Mr. Grad has been upon the stand. We should not have secondary evidence in regard to his proof.

1073 The Court: I will overrule the objection.

Mr. Schenck: Exception.

A. What is the question?

The Court: Did Grad approve these specifications?

The Witness: He did.

Q. Mr. Banfield, you know that certain bronze screens were not installed on the lobby floor? A. I do.

Q. In your opinion did the absence of these bronze screens decrease the value of the building in any respect?

1074

Mr. Schenck: I object to that on the ground it is irrelevant and incompetent.

The Court: Overruled.

Mr. Schenck: Exception.

A. They did not.

Q. Do you remember that certain racks and shelving were not placed in the check room on the first floor, and that certain mail and key racks and shelving were not placed in the room clerk's office? A. I remember.

Q. And that file racks and wood screens were not placed on the counters of the desk space in the main lobby? A. That is correct. 1075

Q. And that a counter and six phone booths were not placed in a telephone room, and that wood folding doors were not placed between private dining rooms on the first floor. Do you remember all these several items? A. I do.

Q. In your opinion did the absence of these items decrease the value of the building? A. They did not.

The Court: Are you going to ask about each one in Schedule B, every item of Schedule B? If you are I suggest that you show him the exhibit and ask him what you want with respect to those items. 1076

Mr. Schenck: I think for the purpose of shortening it I could take it for granted that he had asked him in regard to each of the items on Schedule B and that the witness's answer, if that is correct, is the same.

The Court: If that is the fact why not shorten it that way?

Mr. Murray: That is perfectly satisfactory to me, your Honor. It is stipulated, then, that the witness would testify that these several items listed in Schedule B by their omission did not decrease the value of the building. 1077

Mr. Schenck: I think you can ask him in that summary way.

The Witness: That is right.

Mr. Schenck: Instead of going into each item.

The Court: And he so testifies.

The Witness: That is correct.

1078 Mr. Schenck: And in regard to each of those items it is understood that I raise the same objection and your Honor's ruling is the same?

The Court: Yes, and you have an exception.

Q. I show you Defendants' Exhibit F, Mr. Banfield (handing witness). A. (Witness hands exhibit to Mr. Murray.)

Q. Now I show you Defendants' Exhibit G for Identification (handing witness), and ask you whether that is an exact copy of the specification
1079 which is referred to in Defendants' Exhibit F? A. It is.

Mr. Murray: I offer it in evidence.

(Defendants' Exhibit G for Identification now marked in evidence.)

Q. Did you visit this job during the course of construction, Mr. Banfield? A. I did.

Q. Did you keep or retain general supervision over the work being performed there? A. I did.

Q. Was there an office in the building during the course of construction? A. There was.

Q. And were there plans and specifications kept
1080 in that room? A. There were.

Q. What kind of plans were kept there? A. Plans and specifications which were duplicates of the signed plans and specifications of the respective contractors on the job, certain plans for the purpose of noting the progress of the work and the installation of work and materials. In fact all records of the job necessary to its completion.

Q. And in what place or in what manner were they kept in that office? A. In certain files, tables,

and so forth, with the exception of what we term 1081
"progress charts" which were kept on the wall for the purpose of contractors seeing if they were on time and in coordination with other trades that they had to follow up or that had to follow them, and for my own record when I stepped into the job, to look around and tell approximately the status without looking at each individual piece of work.

Q. The progress charts were hung on the wall, you say? A. They were.

Q. As the work progressed would certain markings be placed upon these charts? A. They would. 1082

Q. Referring specifically to steam fitting work, what would the charts show?

Mr. Schenck: I do not see the relevancy of this. I do not want to make objections constantly.

The Court: What is the relevancy of it?

Mr. Murray: The point is that the inspectors of The Prudence Company visited that office in addition to the rest of the work and examined these plans and saw exactly what was going on, and that they had knowledge of the fact that certain particular items for 1083
which The Prudence Company now claims were not being performed.

The Court: Where are these charts that you speak of? After all, the witness is describing them. Are they here?

Q. Do you know where those charts are now, Mr. Banfield? A. I do not.

Q. Do you know what became of them after Central Park Properties went off the job? A. To

1084 the best of my knowledge they were removed to the Lefcourt office.

Q. Have you searched the Lefcourt organization offices to attempt to discover such charts? A. I have.

Q. And have you been able to find them? A. I have not.

Q. Referring specifically to steam fitting work, what did the charts show from day to day? A. We had a particular plan known as the riser sheet, showing each steam riser and its number in relation to the number on the floor plan. A copy of that particular plan was tacked on the
1085 wall and as the steamfitter progressed with his work the particular riser or diagram of the riser on that plan was marked off with a colored crayon to the height that the steamfitter had progressed up to that time, and the date put alongside.

Q. What do you mean by a riser? What is a riser? A. A riser in this particular instance is a pipe running vertically for the purpose of supplying steam to radiators on the respective floors.

Q. Can you tell me whether if provision had been made for the placing of radiators, steam radiators, in interior bathrooms, there would have been a separate riser shown for that?

1086

Mr. Schenck: I object to that upon the ground it is argumentative.

The Court: He can ask whether the plans did show that or whether the charts did show that.

Q. Did the charts of which you speak show any provision for a riser for interior bathrooms? A. We had two sets of plans, and I do not care to state from memory without actually seeing that,

that the particular plan we had there showed these risers, and that we did not mark them off, or that the plan did not show the risers. 1087

Q. Would there appear, or did there appear on this chart, the several risers which were being installed? A. There were to the best of my recollection some fifty or sixty risers all told, or sets of risers.

Q. And is it possible that all of the sets might not have been shown on this chart? A. It is.

Q. When is the steam fitting work first started? What is the condition of the building when the steam fitters start the installation of risers, Mr. Banfield? A. Approximately eight stories of steel and four stories of floor arches. 1088

Q. The flooring has been laid on about four floors? A. That is correct.

Q. And the between these cement floors is it open space? A. It is.

Q. And is the presence of the risers for steam obvious to anybody who comes in? A. It is.

Mr. Schenck: I do not think the witness should state that the presence of steam is obvious to anybody who comes in.

The Court: That anyone who came in and had his eyes open could see it. I suppose that is what is meant. 1089

Q. While you were upon the job did you at any time see men who you knew to be representatives of The Prudence Company there? A. I did.

Q. Whom did you see there? A. I saw Mr. Walters, I saw Mr.—I cannot recollect his name; I will think of it in a minute. Mr. Schermerhorn.

Q. Do you remember whether you ever saw Mr. Billsborrow there? A. I cannot recollect that I did.

1090 Q. Where in the building have you seen Mr. Walters and Mr. Schermerhorn? A. Various parts of the building at different times.

Q. Have you seen them in the superintendent's office? A. I have.

Q. Had you at different times discussed the work with them? A. I did.

Q. Do you remember that mouldings had been which had been installed? A. I do.

Q. Will you tell us what quality of medicine cabinet they were? A. They were about the best of the respective kinds that we could buy.

1091 Mr. Schenck: I think I must move to strike that out, your Honor.

The Court: I will deny the motion.

Mr. Schenck: Exception.

Q. Did you see the building at the time that the painting contractor had performed all the work which he was required to perform by his contract? A. I did.

Q. In your opinion what would it have cost to complete with the final coats of paint those spaces which the contractor had originally painted with the basic coats?

1092 Mr. Schenck: I object on the ground that the witness is not shown to be qualified.

The Court: Overruled.

Mr. Schenck: Exception.

A. Do I understand you, to complete the contract as originally specified?

Q. (Read by the stenographer.) A. About $14,000.

Q. Do you remember the medicine cabinets installed in all of the living quarters in that building? A. I do.

Q. With those mouldings removed how much in your opinion would it have been necessary to pay to complete the painting of those walls because of the removal of the moulding? A. About $12,000. 1093

Q. As to the lighting fixtures, do you remember the lighting fixtures, Mr. Banfield? A. I do.

Q. Will you testify or tell us what quality of lighting fixtures were installed in that building, as to quality? A. Installed a fixture that was in keeping with the conformity of that type of hotel.

Q. Do I understand you to mean that the quality of fixture which was installed there was suitable to that building? A. I do. 1094

Q. There were soap dishes installed in the guest baths, whereas the original specification called for the combination soap, glass and toothbrush holders. Will you explain to us just what was installed in the bathrooms in respect of holders? A. The medicine cabinet was so constructed that in the bottom of the medicine cabinet there was a glass shelf which was not obstructed when the door was closed. In other words, there was an opening at the bottom there at all times, which takes the place of the necessity for the installation of toothbrush holders, glass holder, and so forth. In other words, the toothbrush holder, 1095 glass holder and so forth, as enumerated there, are incorporated in the medicine cabinet.

Q. And in addition there was a soap dish installed? A. A soap dish; yes, sir.

Q. In your opinion was the medicine cabinet with this additional glass shelf and the soap dishes equal in value and in quality to a medicine cabinet without that glass shelf and a combination soap, glass and toothbrush holders? A. I would say it is superior.

1096 Q. What investigation and research was made by you and others in your organization with your knowledge as regards finding fixtures, lighting fixtures and other equipment for the building? A. We made visits—when I say "we" I mean sometimes myself or perhaps Mr. Youngson of the Mechanical Department, or Mr. Haas, and various ones; sometimes alone, sometimes accompanying one another. In other words, in all these changes and all these various items we investigated insofar that we went to hotels that were already in operation and by our observation and inquiries and so forth arrived at these
1097 respective conclusions.

Q. Did you in the doing of your work endeavor to buy the cheapest possible equipment and materials? A. We did not. Or I did not.

Q. How many bids did you get on these several contracts, proposed contracts, for fixtures and equipment? A. Do you mean the number of bids?

Q. Yes, running from what to what? A. Well, from say three up to as much as ten.

Q. I call your attention to the bedroom mirrors which were plain instead of bevelled as specified in the specifications. Tell me whether in your opinion the plain mirror is of greater value than
1098 the bevelled mirror. A. From the standpoint of dollars and cents I would say that it is not as expensive as a bevelled mirror, but from the standpoint of usefulness, in the particular instance in which it was used it is more valuable, insofar that they were very narrow doors and if you bevelled the mirrors you take away part of the usefulness of the mirror, approximately an inch on either side; and the mirrors to begin with were not quite or approximately eighteen inches,

and if we bevelled the mirror in place of an eighteen inch mirror for the bedroom we only had the equivalent of a sixteen inch mirror. We investigated and so forth and came to those conclusions. 1099

Cross examination by Mr. Schenck.

Q. Mr. Banfield, what apartment hotels had you previously supervised the construction of for the Lefcourt organization? A. None.

Q. So that as to this particular type of building, this was your first detailed experience? A. Of that magnitude, yes.

Q. You stated on your direct examination that at the same time this work was going on the Lefcourt organization was constructing three or four other jobs. A. That is true. 1100

Q. Of which you were also in general supervision? A. That is correct.

Q. And as I understood your office you were the general supervisor of construction of all of the Lefcourt construction work? A. That is correct; under the jurisdiction of Mr. Haas.

Q. Mr. Haas's particular function was the business of financial end of the enterprise? A. It was not.

Q. I do not know, you know, so I am just inquiring. It was the same as yours, was it? A. Yes, sir. 1101

Q. The practical construction end? A. Mr. Haas was secretary and treasurer of the Lefcourt organization in charge of construction.

Q. Yes, but your function at any rate was the practical construction end of it as distinguished, we will say, from the financial end? A. That is correct.

1102 Q. So that you had no contact directly with the offices of The Prudence Company in regard to the building loan agreement or the advancement of loans under it? A. That is correct.

Q. Was there a supervisor of construction on this particular job under you? A. There was.

Q. And what was his name? A. Mr. Kiely.

Q. Approximately how often would you go to this job? A. Every day.

Q. And would spend a part of every day upon it? A. Correct.

Q. And speaking very generally, were you and Mr. Haas the what might be called last authority
1103 in regard to these changes from plans and specifications? A. As far as I was concerned Mr. Haas was the last authority with me; but I cannot answer for Mr. Haas.

Q. You spoke of Mr. Kingsley. Who was Mr. Kingsley? A. Mr. Kingsley was the mechanical engineer employed by the Lefcourt organization for the drawing of the plans and specifications for all the mechanical work for these respective jobs.

Q. He was not an architect? A. Mechanical engineer.

Q. He was not an architect? A. No.

1104 Q. After Mr. Grad left the job who was the supervising architect upon this job? A. Victor Bark, Jr.

Q. He was the supervising architect? A. I beg pardon, Victor Bark, Jr., was the architect of record in the Building Department.

Q. The architect of record in the Building Department, but he was not the supervising architect, was he? A. He was not.

Q. So that after Mr. Grad left this job, this job had no supervising architect? A. You say after

Mr. Grad left the job. Mr. Grad was not the supervising architect. 1105

Q. I realize that that may be your contention, but I am asking whether after Mr. Grad left the job there was any supervising architect on this job. A. Not to the best of my knowledge.

Q. There is no reason why you should not answer me frankly, or argue with me, is there? A. Except that I did not quite understand your question.

Q. These general specifications which you said entered into the part of each and every sub-contractor on the job provided in Article 38, at page 9, that the architect was to have the general supervision and direction of the work, and it also provided that in case of the termination of the employment of the architect the owner should appoint a capable and reputable architect whose status under the contract should be the same as that of the former architect; and as I understand you that was never done? A. I do not know whether that is stated in the general conditions, so I cannot answer. 1106

Q. Taking for granted that it is stated in the general conditions. The general scale of these specifications, that a supervising architect be the representative of the owner on the job and determine as the last authority questions of plans or specifications, or whether work complied with plans and specifications—that was not carried out? A. Not in that sense, no. 1107

Q. What is that? A. Not in that sense, no.

Q. And as a matter of fact there was no architect who was issuing certificates as to progress of work or issuing certificates as to whether subcontractors were entitled to money under the work? A. There was not.

1108 Q. And as a matter of fact the Lefcourt organization was in reality the general contractor here, wasn't it? A. They were.

Q. You have testified on direct examination from a list of changes from plans and specifications that have not before been mentioned in the case, and I presume that in making up that list you went over all available material in the way of plans and specifications? A. I only spoke in generalities, and just hit certain things. I did not make a thorough study and go over these plans and specifications. It was simply things that came to my mind, knowing the job as I did.

1109 Q. So that you prepared this list from your memory? A. Practically from my memory.

Q. And you did not check up on plans and specifications, as to whether— A. I did look at a set of plans, but the original plans—I mean I did not take the original plans as provided by The Prudence Company and the original plans as became part of the contracts and sit down and make a study of them. I simply looked at the original plans as became part of The Prudence Company and said, well, that was what the plans originally called for, and from my memory I know approxi-

1110 mately what we done, and from that I made this list.

Q. I am, of course, inquiring whether you included on that list departures from plans and specifications which to your mind lessened the general value, as well as the departures that you claimed increased it. A. Would you care to see the list?

Q. No, I do not care to see the list, but did you— A. I simply made the comparison for the purpose of clarifying, and recollecting what the

difference was, and what changes that we had made—that is, material changes. 1111

Q. Of course, looking at it for the moment, if you will, from the standpoint of The Prudence Company, after the stage of construction gets to covering up with plaster, lath and plaster, certain work, it is very difficult to ascertain whether the work is in conformity with the plans and specifications or not. Did you recollect any changes in that respect, of work that had been covered up in the course of construction that in reality was changed from plans and specifications? A. If you will recall, I mentioned an item of steel. That is entirely covered up. 1112

Q. How about the dimensions of pipes? Was there any change in the dimensions of pipes? A. The dimensions of pipes in most cases and ninety-nine per cent. of the cases are still there for inspection. There is practically no piping in the building that is really covered up. It is not buried in the masonry or anything like that.

Q. You are making a very good argument, but I am asking for the facts. Was there any change in the dimensions of the pipes from plans and specifications, regardless of whether they knocked you in the eye or not, or regardless of whether they are hidden? Do you know of any such changes? A. Not to the best of my knowledge. 1113

Q. Do you recognize those specifications as the specifications of Mr. Kiely on the job (handing witness)? A. I believe I do.

Q. What? A. I believe I do.

Q. Will you turn to the plumbing specifications on page 14 and tell us whether there has been a change in respect of fittings for brass pipe to

1114 standard weight instead of heavy weight? A. There is in this particular specification.

Q. Now will you turn to page 23 of that specification. Has there been a change in pipe dimension there? A. There has.

Q. What is the change? A. One inch to three-quarters.

Q. One inch to three-quarters? A. Correct. And an inch and a half to an inch and a quarter.

Q. Now turn to page 34 and tell me whether the duplex ejector has been omitted and that "an" ejector has been substituted for a duplex ejector?

1115 Mr. Murray: I would like to know whether the specifications which the witness has are claimed to be the original specifications?

Mr. Schenck: No, they are claimed to be the specifications of Mr. Kiely in the actual operation of the job, and these are claimed to be departures unknown to us, in regard to structural matters covered up by construction.

Mr. Murray: Departures from what? Departures from what, the original specifications or from these specifications?

Mr. Schenck: If you will allow me to pro-
1116 ceed with the examination.

Q. Have you got it? A. I have. It refers to an addenda, and the addenda says, "In lieu of the pneumatic apparatus described," and so forth.

Q. Now if you will turn to the addendum. A. I have the addendum before me.

Q. Certain covering omitted on pipe branches. Perhaps I have not recited it accurately. A. That is correct. "No covering will be required on hot water branches."

1117

Q. I wonder if you could turn to the marble work section in that same specification and see whether you can find the place where one type of marble is substituted for another, and on that same page where saddles of one inch are substituted in place of saddles— A. Will you tell me what page you are referring to?

Q. I have not got the page here. Bl[illegible] Belge marble substituted for others. A. I see what you refer to.

Q. Now do you see a substitution of saddles of one inch instead of one inch and a quarter? A. I do.

1118

Redirect examination by Mr. Murray.

Q. You recognize these specifications which you have before you, Mr. Banfield? A. I do.

Q. As specifications which had been in Mr. Kiely's office? A. They were the specifications which we furnished to the construction office of the 59th Street job.

Q. And do you know where they have been since the Central Park Properties went off the job? A. No, sir.

1119

LOUIS HAAS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Haas, what was your connection with the Lefcourt organization? A. Secretary and treasurer in charge of construction.

Q. And what duties did you perform in connection with that secretaryship and treasurership

1120 and in charge of construction? A. The awarding of contracts and supervising the Construction and Engineering Departments in the erection of the buildings.

Q. When and where did you first personally come in contact with The Prudence Company as regards this building? A. The day that the loan was closed at their Madison Avenue office.

Q. Whom did you see at that time? A. Mr. Bigelow.

Q. Do you know who Mr. Bigelow was? A. I believe he was an assistant vice-president or vice-president.

1121 Q. And what if anything did Mr. Bigelow show you at that time? A. A set of plans and a set of specifications.

Q. Did you at that time have a discussion with Mr. Bigelow as to the type of building to be erected, or anything in that connection? A. No, sir.

Q. What talk did you have with him?

Mr. Schenck: I object to this on the ground it is irrelevant so far as—

The Court: What is the purpose of the question?

1122 Mr. Murray: I simply want to show how the work was started. It is only going to take a very short time, your Honor.

The Court: But I do not see the relevancy.

Mr. Murray: If you want to have me tell you what he will testify to, Mr. Bigelow told him to communicate with Mr. Walters during the construction.

The Court: I will permit him to say that.

Mr. Schenck: Your Honor will grant me an exception. My contention is that this is

an attempt to vary the terms of the written contracts, and that the defendants are estopped from raising any such question by the specific terms of the bond, that state that there be no waiver of any of the provisions except in a particular manner, and that a waiver in one instance does not result in a waiver in another instance. 1023

The Court: Is this the conversation before the agreement was entered into?

The Witness: The same day, sir.

The Court: Before or after?

The Witness: Mr. Lefcourt and the attorneys were in one office consummating the deal and I was in the other office going— 1024

The Court: I will sustain the objection.

Mr. Murray: Exception.

Q. Did Mr. Bigelow during that conference mention Mr. Walters' name to you? A. Yes, sir.

Q. And what if anything did he say to you regarding Mr. Walters?

Mr. Schenck: That, of course, is the same thing.

The Court: Sustained.

Mr. Murray: Exception. 1025

Q. Did Mr. Bigelow at that time tell you that Mr. Walters would have complete charge of the relations between the Central Park Properties and The Prudence Company?

Mr. Schenck: Same objection.

The Court: Sustained.

Mr. Murray: Exception.

Q. Was it on September 24, 1929, that you had this conversation with Mr. Bigelow? A. I am pretty sure it was.

1126 Q. I show you Plaintiff's Exhibit No. 6 and ask you whether you ever saw that instrument before, Mr. Haas (handing witness)? A. I did.

Q. Are your initials on that instrument? A. Yes, sir.

Q. The initials "L. H." are yours? A. Yes, sir.

Q. When did you initial that instrument? A. On September 24, 1929.

Q. Was that the same day you had your conversations with Mr. Bigelow regarding Mr. Walters? A. I am quite sure it was.

Q. Do you remember the fact that the bronze
1127 work, certain bronze work, was omitted from the lobby floor of this building? A. Yes, sir.

Q. In your opinion did the omission of that bronze work decrease the value of the building?

Mr. Schenck: I raise the same objection I raised before.

The Court: Overruled.

Mr. Schenck: Your Honor will grant me an exception.

The Court: Yes.

A. It did not.

1128 Mr. Schenck: If Mr. Murray desires to proceed along that line I shall raise no objection to his asking the same question, lumping it, in regard to all the items of Schedule B.

The Court: And the witness may answer it that way.

Mr. Schenck: Your Honor granting me an exception.

The Court: Yes.

Q. I show you Plaintiff's Exhibit No. 85 in evidence, Mr. Haas (handing witness), and ask you

to examine these several items listed on that 1129
schedule and state whether or not in your opinion the several omissions and substitutions decreased the value of the building? A. They did not.

Q. How much experience had you in construction work or in the buying for construction work? A. Twenty-two years.

Q. Do you know in what respects, if any, the Central Park Properties Company put into that building things which were not required by the original plans and specifications? A. Well, I believe that everything that Mr. Banfield testified to would be the same as I would testify to in that 1130
respect.

Q. Have you made any detailed examination of the plans and specifications to determine what, if any, such changes were made? A. I did not.

Q. With special reference to the lighting fixtures, will you say whether or not the lighting fixtures which were purchased by you were of first quality? A. I would say they were.

Q. Do you know whether or not between June, 1929, and the time the electric fixtures were purchased, and other matters of equipment were purchased, there was any change in the cost of such materials? A. Prices began to drop just about a 1131
little after 1929. They started down; and in 1930 and in '31 and a portion of '32 they commenced to rise again.

Q. We are only interested down to 1930 and 1931. Were the costs of materials less in 1930 than they were in 1929? A. From late in 1930.

Q. The medicine cabinets, do you remember them, which you contracted for? A. Slightly.

Q. Were these medicine cabinets of a first quality? A. They were the same cabinets as were used, I understand, in the Savoy Hotel.

1132 Q. Were they of first quality? A. I would say they were.

Q. Do you know how much it cost the Central Park Properties to erect this building, as far as it went?

Mr. Schenck: I object to that on the ground that it is irrelevant and immaterial in this case.

The Court: Sustained.

Mr. Murray: Exception.

Q. Was it you who let all contracts? A. Yes, sir.

1133 Q. To contractors? A. Yes.

Q. And did you keep a record of the prices—of the contract prices of these contracts? A. Yes, sir.

Q. By erecting this building yourself or by the Central Park Properties erecting this building itself, instead of letting to a general contractor, how much money or how much percentage was saved, which a general contractor would receive?

Mr. Schenck: I object to that on the ground that it is irrelevant in this case.

The Court: Sustained.

1134 Mr. Murray: Exception.

Q. I show you now certain specifications which have been identified as specifications which were on the job during its construction (handing bound volume to witness). Did you ever see those specifications before—that particular book? A. Well, I might have seen it up on the working table or in the office of the building.

Q. Was this ever returned to your office after the Central Park Properties left the job? A.

Well, I can not specifically say whether that was. 1135
That was quite a lot returned, but whether that was or not, I don't know. It would not come to my direct attention anyway.

Q. How many sets of such books did you have? A. Just one.

Q. Just one? A. Yes.

Q. Was there not one or was there one at the office in addition to one at the job? A. I understood you to ask me about at the job.

Q. How many of these books were there in existence during the construction of the job? A. One set of specifications were filed by the building office at the job, and one was kept in our office— 1136
a signed copy.

Q. And do you know how many such specifications were in your office recently, of this type? A. The office copy that we have.

Q. And if this is the building job specifications, was that ever in your office (indicating)? A. I have not seen it since it has been at the job.

Q. Do you remember when it was that the Central Park Properties withdrew from the building? A. Yes, sir.

Q. When? A. Approximately about the middle of December, 1930. 1137

Q. Now, at that time was any request made or demand made for the return to the offices of Central Park Properties of all papers which were at the job in connection with the job? A. Yes, sir.

Q. Do you know, Mr. Haas, whether at or about the time that Central Park Properties withdrew from the job papers came from the job to the office? A. Yes, sir.

Q. Do you know whether any check was made to determine whether everything had come over

1138 which had been on the job? A. Well, that would be routine, and that would have been up to Mr. Banfield to do. He checks it up and sees that the papers are all returned.

Q. That was not your duty? A. No, sir.

Q. So you do not know as regards that? A. No, sir.

Q. Now, on or about December 15th or 20th, and after the withdrawal from this job, what was the status of the Central Park Properties? Did it still continue as a going concern? A. You mean the corporation?

Q. Yes. A. No, it was turned over to a cred-
1139 itors' committee by Mr. Lefcourt.

Q. And when it was turned over, were any of the papers in connection with the corporation turned over to that committee also? A. Yes, sir.

Q. Was there considerable confusion in the office after this occurrence? A. There was in the filing room.

Q. Can you tell whether there is now in existence at any place where you know all letters passing between Prudence Company and Central Park Properties? A. I would not know that. I imagine that some of them are still up in the Lefcourt of-
1140 fice, but I had very little to do with the filing of letters after they were once received.

Mr. Murray: I now offer in evidence a letter of January 19th, 1930, from Prudence Company to Central Park Properties (handing paper to Mr. Schenck).

(Marked Defendants' Exhibit L.)

Mr. Murray: That is simply a letter requesting the lobby details, your Honor.

The Court: Yes.

Q. Do you remember what you did in connection with that, Mr. Haas? A. Well, this letter would be referred back to Mr. Klein, and he would carry out the instructions. 1141

Q. I show you now a letter from Frank Grad to Mr. Haas, and ask you whether that refreshes your recollection regarding what transpired (handing witness)? A. Well, I would say that this letter would have taken the same course. This letter would have been referred by me to Mr. Klein, who would have handled that with Prudence.

Mr. Murray: I now offer in evidence this letter—January 21, 1930 (handing paper to Mr. Schenck). 1142

(Marked Defendants' Exhibit M.)

Mr. Murray: I now offer in evidence a letter from the Prudence Company.

(Marked Defendants' Exhibit N.)

The Court: Mr. Murray, have you a considerable number of letters that you are going to offer? If so, we can save time by your introducing all of them, and having them in the record now. 1143

Mr. Murray: Introducing all of them?

The Court: Yes, all that you have to offer, at one time.

Mr. Murray: Yes, I can do that. I now offer in evidence seven letters.

The Clerk: Shall I mark them as one exhibit, Judge?

The Court: Yes.

(Papers marked collectively Defendants' Exhibit O.)

1144 Mr. Murray: I would like to have your Honor glance at those letters (handing paper to the Court).

The Court: All right.

Mr. Murray: I do not want to seem to be too persistent, your Honor, but probably under Article 15 regarding changes in work, you probably had not considered the situation as it is; and that is that the Central Park Properties was at the same time the owner and the general contractor—if you wanted to make a comparison in that way; and that naturally in the ordinary case, where general
1145 conditions or general architectural conditions are used, an architect is contemplated, a general contractor is contemplated, and the ordinary owner does not himself construct his own building, but he employs an architect for the purpose of being his agent and making whatever contracts may be necessary with contractors. The owner, in such event, may or may not have very much to do with the work itself. He may never go near the work.

Now, in such event, since the architect is the owner's agent for that purpose, there is
1146 a provision put in that an architect may order extra work, for which the owner thereupon would be liable; or the architect may decrease the work, but in any event, in such case—in any such case, since the owner is the owner and the one to be satisfied, the owner has the right practically at will to change; and I say that that is applicable to this case here. The owner, the Central Park Properties, practically had the right to change at will, so long as, in good faith, it put up or erected a build-

ing which was sufficient security to the lender of money to it. 1147

The Court: Well, who passed on it? Did the owner have the exclusive right to determine that for himself?

Mr. Murray: As I read the specifications, yes.

(Colloquy omitted)

Mr. Schenck: If your Honor please, I realize that the construction that Mr. Murray is attempting to place upon these instruments is presented from the standpoint of rulings upon evidence, but it seems to us that it is— 1148

The Court: Of course, that does not take care of the matter of pleading.

(Further lengthy argument respecting construction of Article 15 omitted.)

Q. Now, I show you Plaintiff's Exhibit No. 76, and ask you whether you ever saw that or a similar document (handing witness)? A. Yes, sir.

Q. This document is dated December 5. Is that the date upon which you got the final advance? A. Part of it.

Q. How much did you get on that date? A. $225,000. 1149

Q. How much was remaining unpaid on that date, before you got that $225,000? A. $300,000.

Q. Now, for some time prior to December 5 did you have discussions with anybody in The Prudence Company regarding the obtaining of the final advance? A. Yes.

Q. And with whom were those discussions had? A. Mr. Braislin.

Q. Were there any discussions with anyone else than Mr. Braislin? A. After I was through with Mr. Braislin, with Mr. Henry Mark.

1150 Q. And who was Henry Mark? A. The attorney for The Prudence Company.

Q. Was he an officer of The Prudence Company? A. I believe he was a vice-president.

Q. And had you been referred to Mr. Mark by Mr. Braislin? A. Yes, sir.

Q. Were these discussions regarding the amount of money which should be paid to the Central Park Properties? A. With Mr. Braislin, yes.

Q. And what were those discussions? A. I made application to Mr. Braislin—that is, when I say "I", I mean through the comptroller of Central Park Properties,—for the final payment
1151 of $300,000. Several days after the application had been made to Prudence, word was sent in to my office that Mr. Braislin would only recommend quite a material cut of the $300,000. I had a telephone communication with Mr. Braislin that day, and he invited me over to his office in Brooklyn. I went over there, accompanied by Mr. Klien, of our employ, and Mr. Banfield—

Q. How long before December 5, approximately was that? A. About two weeks.

Q. Proceed. Did you go to see Mr. Braislin? A. I went to Mr. Braislin's office, and spent nearly the entire day with him and his department, and
1152 we got nowhere as to what he wanted to give us—to give me, and what I was ready to take; and I left his office; and the next time I was in communication with Mr. Mark—and he, in the meantime, as I understood from Mr. Mark, had been talking with Mr. Braislin—and Mr. Mark told me that they would make a complete inspection of the building, and that pending that inspection, we would wait until whatever time it took them—

Q. Did you agree to wait until that final inspection was made? A. Yes, sir. I was brought in

to—Mr. Mark telephoned me or, rather, I telephoned him each day, anxiously waiting for that inspection; and it finally drifted down to where Mr. Mark said that they would—that The Prudence Company would hold back $75,000 of the $300,000 payment, and led me to believe that that was what The Prudence Company required, and Mr. Mark said that that was all that was needed to complete the building. 1153

Q. Mr. Mark said at that time that $75,000 would have been sufficient to complete the building? A. Yes, sir.

Q. And what was your answer to that? A. I told him I thought it was over $50,000 excessive. 1154

Q. But did you agree to take or agree to allow them to keep the $75,000 for final completion? A. And whatever was left over we were to get back.

Q. Now, how much experience have you had, Mr. Haas, in connection with borrowings from surety companies and others for the erection of buildings? A. About twenty or twenty-five million dollars over the course of twenty years.

Q. And how many buildings have you had connection with on which building loans had been obtained? A. Possibly about eleven out of seventeen.

Q. What arrangement did you make with Mr. Grad as regards this particular job? A. The Central Park? 1155

Q. Yes. A. Mr. Grad's arrangement was to get a certain sum of money to draw a set of plans, draw the details and check shop drawings, and draw the specifications other than mechanical.

Q. Other than that, what authority was given to him by you? A. What authority was that?

Q. Other than what you have enumerated, what duties did he have to perform for you?

1156 Mr. Schenck: I object to that, if your Honor please, as involving a conclusion. If there is any agreement that was entered into—

The Court (Interposing): Well, that is what the question calls for.

Mr. Schenck: Yes.

The Court: What was the agreement?

The Witness: Just the regular architectural office duties.

Q. Was there any agreement that he should supervise the work? A. None whatsoever.

1157 Q. Did you know that he ever supervised the work? A. He never did, to my knowledge.

Q. To your knowledge were the specifications always prepared in Mr. Grad's office? A. Not completely, no. We completed them in our office.

Q. Do you know whether every specification upon which contractors worked ultimately received the approval of your office? A. They always did.

Q. And as the work progressed were there changes in the specifications from time to time? A. Yes, sir.

Cross examination by Mr. Schenck.

1158 Q. Just a few questions, Mr. Haas. You stated on your direct examination that a great many of your papers were in confusion after these matters were over. Do you have in your possession at the present time any papers which would show in any detail how much money Central Park Properties owed the contractors on this job on the 5th of December? A. I would not have that at all.

Q. What is your general remembrance of the approximate amount of money that Central Park

Properties owed contractors on this job on the 5th of December? A. I would not know the first thing of any financial condition of the Lefcourt Company or the Central Park Properties at any time. 1159

Q. Can you tell us how much, if any, of the $225,000 which you got from The Prudence Company on the 5th of December, was paid to contractors on this job? A. I would not know that, either.

Q. Did you at any time in your negotiations with Mr. Braislin for this final advance of the loan, represent to Mr. Braislin that you needed the money to pay contractors on the job? A. Yes, sir. 1160

Q. And at the time you made that representation, of course it was true? A. Yes, sir.

Q. You did need the money to pay contractors? A. Yes, sir.

Q. But you can not tell me whether or not any part of that $225,000 was paid to contractors on this job? A. I am quite sure a lot of it was paid to them, but the accounting department or the comptroller would have that information. I would not.

Q. Now, you said that you let every contract on this job? A. Yes.

Q. As I recollect your testimony. A. Yes. 1161

Q. Can you tell me whether, in general, the method of payment of the other contracts was approximately the same as the Gladstone painting contract; that is, one-half in notes, and one-half in cash? A. The majority of all the contracts were.

Q. Yes; and was the situation with regard to the painting contract approximately the same with regard to the other contracts; that is, that at the

1162 end of the job there were notes outstanding that were not met, and here was a substantial amount of cash due the contractors on the job? A. I think that was so.

Q. Yes. I show you now a letter from Central Park Properties to Frank Grad, dated the 16th of October, 1929, and I call your attention particularly to the signature "L. Haas", with a little initial below it, and ask you if that is your signature (handing witness)? A. It is not.

Q. Do you recognize whose signature it is? A. Well, I would recognize the dictation note.

Q. And whose initial is that? A. That would
1163 be Mr. Lush.

Q. You say that the little "l" is his signature? A. That I don't know. He is here and can testify to that.

Q. Yes. I am asking that because it characterizes quite a number of the other letters. A. Those are dictated out in the construction department, without my knowledge, but are signed with my name. They are dictated, and copies of those are usually put on my desk each morning.

Q. If I may be a bit general in this respect, Mr. Haas, the course of business indicated in this and similar letters is that the letter would be written
1164 in your name, but prepared by Mr. Lush? A. Or anyone else. Mr. Youngson might have written the letter—who was in charge of the mechanical department.

Q. I see from this letterhead that there are some 16 different corporations involved in the A. E. Lefcourt Realty Holdings? A. That is correct.

Q. And from their names, they seem to have some similarity to yours, Mr. Haas? A. Quite so.

Q. I assume you were involved in each one? A. Not financially, but just as an employee. 1165

Q. Yes. I am speaking of individually, so far as business cares and details are concerned? A. Correct.

Q. You were involved in a multitude of transactions in that period of time, were you not? A. Yes.

Q. And Mr. Banfield has stated that there were four or five construction jobs going on at the same time in the Lefcourt organization. That is your recollection, is it? A. Three of them were substantially completed, just finishing up, when the 59th Street job was started. 1166

Q. So far as your general business operations, Mr. Haas, were concerned, particularly when large amounts were involved, as a prudent man you attempted to have each important matter in writing or at any rate in memorandum form, did you not? A. I do not quite get the drift of that question.

Q. I have referred to the fact that your business affairs in that period of time were quite extensive? A. Yes.

Q. And involved large amounts? A. Yes.

Q. Your prudent business method of operation was to carry nothing of importance entirely in your memory, but to have, so far as possible, written memoranda and written agreements? A. I carried plenty in my head, sir. 1167

Q. I realize that; but so far as possible you put memoranda in writing, did you not? A. Wherever it was possible, yes.

Q. Yes. Now, there have been a number of changes in these plans and specifications referred to by Mr. Banfield. Can you tell us whether those

1168 changes in plans and specifications were incorporated in any writings which you are now able to produce? A. I don't recall any specific item that might have been contained in any memorandum. In general, a minor change that might have been made, I usually left it to the ability and intelligence of the construction and engineering department. If a change occurred that was of any great importance, or if we were to adopt a method in doing anything that had not been done before, it was always thoroughly investigated, and a conference generally was held in my office. If I approved it, I told Mr. Banfield or the head of that
1169 particular department to go ahead; and then they went outside in the mechanical room or construction room and changed the plans or added what we had agreed to do.

Mr. Schenck: I see. I now offer in evidence this letter of Central Park Properties to Frank Grad, dated the 16th of October, 1929.

(Marked Plaintiff's Exhibit No. 108.)

Q. Now, Mr. Haas, when you executed this bond—when the Central Park Properties, rather,
1170 executed this bond to The Prudence Company, did you, at the same time, enter into an indemnity agreement with a surety company? A. May I—

Mr. Murray: I object to that as immaterial and irrelevant, your Honor.

The Court: I sustain the objection.

Mr. Schenck: Your Honor will grant me an exception, please?

The Court: Yes.

Q. There has been some evidence taken in regard to letters written by a Mr. Race— A. (Interposing.) Mr. Who? 1171

Q. Mr. Race, of the surety companies. Did you ever receive, during the course of this job, any letters from these surety companies or did you, during the course of this job, ever write any letters to the surety companies, the defendants here? A. Nothing to my knowledge.

Q. Then, you do not recollect that any written inquiry had been made by these surety companies to Central Park Properties at any time during the entire course of this job? A. You mean regarding the construction work? 1172

Q. Regarding anything whatsoever? A. Well, let me explain that as far as the procuring of the bond or procuring of the loan or any financial or any buying or selling of property, or any leasing of property, I had absolutely nothing to do with it at all. Mr. Lefcourt attended to all that personally, and my own job was only construction work.

Q. So that, so far as you know, you never received any letter from the surety companies—from either of these surety companies in regard to the course or the stage of construction, during the entire course of the job? A. I personally never did. 1173

Q. Were you acquainted with any representative of the surety companies during the course of this job, Mr. Haas? A. I have never met anyone connected with the surety company.

Q. And this Mr. Race, of the surety companies, who is referred to as making certain telephonic communications in regard to the job, never telephoned to you? A. This is the first time I have heard his name.

1174 Q. There is a reference made in the correspondence—in the correspondence there has been shown a certain suggestion to Mr. Race that he obtain from Central Park Properties a copy of the certificate of occupancy. Did Mr. Race or anyone on behalf of the surety companies ever apply to you or to the Central Park Properties, so far as you know, for a copy of the certificate of occupancy? A. I can only answer for myself. Not to me.

Q. Not to you? A. No, sir.

Q. Now, at one time you came to Mr. Braislin and applied for the final advance of the loan, and
1175 asserted that you were entitled to that final advance because the certificate of occupancy had been issued, did you not? A. You mean the loan of December 5th that was talked about or the $85,000 that was due?

Q. I have reference to those four requisitions which you executed, that the final advance was due because the certificate of occupancy had been issued. A. Yes.

Q. And you reinforced your statement on the requisition with such argument as you could muster, that inasmuch as the certificate of occu-
1176 pancy had been issued, you were entitled to that final advance? A. That is correct.

Mr. Schenck: I think that is all.

Mr. Murray: That is all.

ANTHONY CLINCHY, called as a witness on behalf 1177
of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Clinchy, what is your business? A. Plumbing and heating contractor.

Q. Are you or were you at one time connected with Charles Darmstadt & Company? A. Charles Darmstadt, Inc., yes.

Q. And were you connected with Charles Darmstadt, Inc., during the course of the erection of a building on 59th Street, which is now known as Essex House? A. I was. 1178

Q. What did you have to do in connection with the Darmstadt contract for plumbing and heating there? A. I estimated the plumbing end of it, and compiled the figures on the heating end, and submitted the estimate to the Lefcourt Company.

Q. After the contract was awarded to Darmstadt, what was your connection with the actual operation of the work? A. To supervise both the plumbing and heating installation.

Q. And did that take you to the building which was in the course of construction? A. It did.

Q. How often? A. Oh, four or five times a 1179
week.

Q. Do you know a gentleman named Walters? A. I do.

Q. Did you know him at that time? A. I met him after the closing of the contract.

Q. Did you meet him on this job? A. I met him in his office first.

Q. And where was his office? A. I think it was Remsen Street, Brooklyn.

1180 Q. And thereafter did you see him on the job at 59th Street? A. I did.

Q. Now, what, if any, conversations did you have with Mr. Walters regarding the heating work?

Mr. Schenck: That is objected to as incompetent.

The Court: Objection overruled.

Mr. Schenck: Your Honor will grant me an exception?

The Court: Yes.

A. Mr. Walters would generally meet me at the
1181 office of the Lefcourt Company, which was on the first floor of the building, and we would go our rounds in a sort of general inspection—he and another gentleman by the name of Schermerhorn, I think, if I am right—and we would discuss the general installation. If we saw something wrong, he would ask me to have the foreman correct it. It was the general inspection that goes on at any construction job.

Q. Was there any time when you and he discussed the question of radiators in interior bath rooms? A. That was just as we closed the contract.

1182 Q. Just as you closed the contract? A. Yes.

Q. Was that in his office at Remsen Street? A. In Brooklyn, yes.

Q. And what was the nature of that conversation? A. The specification—the original specification called for certain radiation to be installed in interior bath rooms; but there was an addenda to the specification that asked for its omission, and at the time of the closing of the contract Mr. Haas said that all these addendas and so forth would

have to be approved by The Prudence Company, and that that would be entirely up to a gentleman by the name of Mr. Walters, whom I was to see along with Mr. Klein, of the Lefcourt organization. We closed the contract subject to a price for omission of the radiation; and after a conversation with Mr. Walters at his office, I believe letters were written omitting the bath room radiation. 1183

Mr. Schenck: I object, and move to strike on the ground that it is incompetent in respect of an attempted waiver. I also move to strike it on the ground that reference is made, in the opinion of the witness, apparently to letters written on the subject. 1184

Mr. Murray: I consent to strike out the opinion.

The Court: Yes; and the last sentence of the answer I will strike, too. In other respects the motion is denied.

Mr. Schenck: Your Honor will grant me an exception?

The Court: Yes.

Mr. Schenck: My objection is directed to the conversation, on the ground that it is an attempt to prove a waiver in regard to certain features of the work through Walters, without showing his authority. 1185

The Court: That is the reason I struck out the last sentence.

Mr. Schenck: And without claiming any written waiver in accordance with the provisions of the bond.

The Court: Yes.

Mr. Murray: I understand that only the last sentence has been stricken out?

The Court: Yes.

1186 Q. When you bid on your contract, Mr. Clinchy, there were alternate bids, were there not? A. Yes.

Q. One which would include radiators for interior bath rooms, and one which would exclude them? A. Yes.

Mr. Schenck: In that respect, I think we should have those alternative features produced, rather than the witness's recollection with regard to them.

The Court: There is nothing objectionable in the question.

1187 Mr. Schenck: I move to strike any reference on the part of the witness to the contents of documents not produced or not accounted for.

The Court: Yes. I will grant that motion.

Q. I show you now this instrument and ask you, Mr. Clinchy, whether that is the contract which was executed between Darmstadt and Central Park Properties (handing witness)?

The Court: Look at the signatures.

A. Yes, sir.

1188 Mr. Murray: I offer that in evidence. That is the heating contract.

(Marked Defendants' Exhibit P.)

Q. Can you tell me by looking at this instrument, Mr. Clinchy, whether the alternate for radiation in interior bath rooms is contained therein, or whether it is excluded therefrom (handing witness)? A. I do not think there is anything here that mentions the bath room radiation, that I can see right offhand.

Q. Well, is it the practice— A. The specifications should govern that, and the addenda should be attached to the specification. 1189

Q. Now, when you were at Mr. Walters' office you mentioned a specification with addenda thereto. I show you now Defendants' Exhibit G in evidence, and call your attention specifically to the addendum No. 1 thereto, and ask you whether that is the addendum which you had in mind when you testified—the last page (handing witness)? A. Yes.

Q. And it specifically provided in that addendum, under F "Interior bathroom radiation: All radiation for interior bathrooms, together with the 1190 risers, valves, caps and so forth in connection with same, is to be omitted"? A. Right.

Q. Now, after that conversation with Mr. Walters in his office, did you afterwards see him on the job? A. Yes, and at our office.

Cross examination by Mr. Schenck.

Q. What was the date of this conversation with Mr. Walters? A. Oh, all through the life of the job, which was—

Q. (Interposing.) No. You have given a particular conversation with him at his office, in regard to this interior bathroom radiation. A. Oh, 1191 I must have had six or seven visits to his office.

Q. In all of which you had this conversation that you have been talking about? A. All sorts of conversations regarding the general construction.

Q. No. I mean this particular conversation that you have been talking about. A. At one of the times that I called at his office, yes.

Q. What is your best recollection of the date of this particular conversation? A. Possibly in the

1192 month of March, 1930; just right after the close of the contract.

Q. You say "possibly". Is that your best recollection? A. My best recollection now, yes.

Q. That is, you first made your agreement with Central Park Properties, Inc., as to the work that you were to do? A. Beg pardon?

Q. I say, you first made your agreement with Central Park Properties in regard to the work that you were to do? A. Yes, sir.

Q. And then you had this conversation with Mr. Walters? A. After the contract was practically consummated.

1193 Q. After the contract was practically consummated? A. Yes; then we were turned over to Mr Walters in Brooklyn.

Q. You say "practically consummated"— A. Yes.

Q. The date of the contract is the 6th of February, 1930? A. Right.

Q. There was no question about its being actually executed? A. Well, as far as that contract is concerned, it was signed on the 6th of February, yes; but it was subject to those addendums. If Mr. Walters was to insist upon it, we were to be paid for anything in the addendums.

1194 Q. You are speaking of that as a clause of your contract, are you? A. As an understanding with Mr. Haas.

Q. No. As a clause of your contract? A. Yes, it is a clause. The contract says—

Q. Will you point out any place where Mr. Walters is referred to in this contract? A. No, not Mr. Walters.

Q. Well, will you point out the clause in the contract to which you refer (handing witness)? A. We were to do certain work—

Q. No. Point it out in the contract. A. This 1195
contract calls for work of $600,000, exclusive of the addendas.

Q. Just point it out to me in the contract? A. Oh, I couldn't do that. The contract calls for the work without the addendas.

Q. And then you had a certain agreement with Mr. Haas, you say? A. Yes; the agreement was with the Lefcourt Company or Mr. Haas representing the Lefcourt Company.

Q. And that was an agreement that if Mr. Walters required it, you would do certain additional work? A. The agreement was—

Q. No. Was it that? A. Yes; if Mr. Walters 1196
required any additional work other than what our contract called for, the Lefcourt Company would give us an order, for instance, to install radiators, and if we were to put them in, we would be paid additional.

Q. Then, was that contract or that agreement that you had with Mr. Haas—was that in writing? A. I believe there was an estimate submitted to that effect.

Q. Have you got a copy of it? A. No. I have no papers on the job whatsoever.

Q. Was any reference made to it in any letter? 1197
A. Yes.

Q. By either— A. By the Darmstadt Company. They were all submitted to the Lefcourt Company.

Q. But you haven't got a copy of that either? A. No, we are out of business too. The Darmstadt Company is also out of business. It has been out of business for two years.

Q. I see. I am not asking for details, but speaking very generally, you know there was a certain

1198 amount of money that was not paid to you on this job? A. Yes.

Q. About how much was it? A. $185,000.

Q. Was that money due on the 5th of December, 1930? A. I guess 50 per cent. of it was due under an agreement. The other was to go along for a certain length of time.

Q. That is, 50 per cent, of the amount that you mentioned was due in cash on the 5th of December? A. About 50 per cent. I should judge.

Q. Did you know anything of this building loan agreement? A. No, sir.

Q. You did not know that there was a building
1199 loan agreement? A. No, sir, I did not.

Q. Did you know or hear rumors that the Central Park Properties was going to get $225,000 on the 5th of December? A. I think we had notice that they were going to receive some money. Mr. Haas acquainted us with that fact. Mr. Mayer, who was the secretary and treasurer of our corporation, and myself were acquainted with it.

Q. You did not get any of it? A. We did, yes.

Q. How much? A. I think, around $20,000.

1200 CUYLER W. LUSH, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. What is your business, Mr. Lush? A. I am an engineer.

Q. Are you the Mr. Lush who has been mentioned during the trial here? A. I am.

Q. Were you connected with the Lefcourt organization at the time the building project at 59th

Street was in the course of erection? A. I was employed by the Lefcourt organization from about the middle of September of 1929 until about the end of September, 1930. 1201

Q. How long have you been an engineer? A. Twenty-nine years.

Q. With what organizations have you been connected? A. I have been connected with The Foundation Company, the Lefcourt Company, the Western Pacific Railroad, some municipalities—a number of them.

Q. And where are you now employed? A. I am employed by the Department of Correction at Clinton Prison, Dannemora. 1202

Q. As what? A. I am an engineer up there. I advise the warden in connection with construction operations, and I have charge of the work done by the inmates.

Q. All construction work is under your supervision? A. All inmate construction.

Q. Prior to your connection with the Lefcourt organization with whom were you connected? A. The Foundation Company.

Q. On or about September 24, 1929, the Central Park Properties obtained an agreement for a building loan from The Prudence Company. Prior to that date did you become connected with the Lefcourt organization, or was it just about that time? A. It was, I think, around the middle of September, 1929. That would be prior to September 24th. 1203

Q. Prior to that date and prior to the loan did you have any familiarity with the plans and specifications upon which The Prudence Company granted their loan? A. I did.

1204 Q. Were you connected with Mr. Grad in the doing of certain work? A. Yes, I was engaged by the Syndicate Subscription Corporation to work with Mr. Grad in developing the plans and specifications.

Q. And the Syndicate Corporation whose name appears on the original specifications; is that right? A. That is correct.

Q. These are the specifications, are they not, with which you had something to do (handing witness) prior to the Lefcourt organization obtaining the loan? A. Yes, these are the specifications.

1205

The Court: There is no doubt about these preliminary matters. There is no use wasting time with those.

Q. Did you have the greater part of the work of preparing these specifications?

Mr. Schenck: I think I must object to that. It is entirely irrelevant, here.

The Court: Did you assist in the preparation of them?

The Witness: I did.

1206 Q. How long did it take to prepare these specifications? A. Well, I think about two weeks. Possibly a little longer.

Q. Did you have anything to do with the preparation of mechanical specifications? A. Well, we had several consultations in connection with the mechanical specifications.

Q. When you went with the Lefcourt organization were you thoroughly familiar with the plan of the building contemplated by the original plans and specifications? A. Yes.

Q. Briefly tell us, Mr. Lush, what you did in 1207
connection with this project. A. You mean after I went with the Lefcourt organization?

Q. Yes. A. Well, after I went with the Lefcourt organization the first thing I did was to, I might say, present a picture to Mr. Haas of that which the Lefcourt organization took over from the Syndicate Subscription Corporation. That is, I tabulated all the sub-bids that the Syndicate Subscription Corporation had received from the various trades, and I am not sure whether I wrote a memorandum to Mr. Haas on the matter or not, but in any event I was present at conferences we had in the matter, so that a picture would be 1208
formed, as I understood it, in Mr. Haas's mind and Mr. Lefcourt's mind and they could make up their minds as to their general policy on the project.

Q. Had you prior to that time obtained estimates of the cost of erecting the building in accordance with these plans and specifications? A. Yes. That estimate had been obtained in two ways, I believe. So far as I am concerned we did get hold of a lot of sub-bids from various sub-contractors who had made bids to The Foundation Company and other people, and we tabulated them and ar- 1209
rived at the cost.

Q. And what was the total estimate to construct in accordance with those plans and specifications?

Mr. Schenck: I object as irrelevant and immaterial.

The Court: Sustained.

Mr. Murray: Exception. I am going to ask Mr. Lush the same question, Mr. Schenck,

1210 which I asked Mr. Banfield and Mr. Haas, regarding the value of the building without these things in here.

Mr. Schenck: I object to the question on the grounds previously urged, but I have no objection to the form of the question and I shall not object to Mr. Murray including all of the items or any that he chooses on Schedule B in one question to the witness.

Q. I show you Plaintiff's Exhibit 85, Mr. Lush (handing witness), and ask you to look at that and state whether or not in your opinion the fact
1211 that these items were not installed in the building decreased the value of that building?

Mr. Schenck: Your Honor will note my objection and exception.

The Court: Yes.

A. Decreased the value of the building from what standpoint?

Q. Well, did it decrease the value of the building from any standpoint? A. Well, it did not decrease the value of the building as security for a building loan. It might have decreased the cost of the building—did decrease the cost of the build-
1212 ing to the extent that those—

Q. Not cost, Mr. Lush, but in your opinion did it decrease the value of the building?

The Court: The witness asks you in what respect.

Mr. Murray: As security for a building loan.

The Court: He answered that in that regard it did not.

Q. Did you have anything to do, Mr. Lush, with 1213
the obtaining of bids and the letting of a contract for lighting fixtures? A. Well, Mr. Klein and I went around to a great many manufacturers of lighting fixtures—

The Court: Isn't this cumulative of what two other witnesses testified to?

Mr. Murray: That is true, your Honor.

The Court: I do not think we need anything more on that subject, do we? Unless you are going to add something to what they said.

Q. Do you know the Essex House as it now 1214
stands? A. I do.

Q. Assuming that after the Lefcourt organization withdrew from the work it was necessary to expend another hundred thousand dollars to complete the building, after the completion in that respect would you say whether or not the building as completed was as valuable or less valuable or more valuable than the building which would have been erected had the original plans and specifications been followed in every conceivable detail?

Mr. Schenck: I object to that as incompetent. 1215

The Court: Sustained.

Mr. Murray: Exception.

Q. Taking into consideration that there have been certain alterations in the ground floor of that building, the ground and basement floors, and that there have been added to the serving pantries certain gas ranges, but leaving these items out of consideration, is the building now as valuable as a building erected in strict accordance with these plans and specifications?

1216 Mr. Schenck: I object to that as incompetent.

The Court: Sustained.

Mr. Murray: Exception.

Q. Would it have been a simple or difficult matter, Mr. Lush, to erect a building, a first-class apartment hotel, on the premises in question, on the plans and specifications as originally drawn?

Mr. Schenck: I object to that on the same ground.

The Court: Sustained.

Mr. Murray: Exception. That is all.

1217 Mr. Schenck: No cross examination.

ALEXANDER C. YOUNGSON, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. What is your business, Mr. Youngson? A. Mechanical engineer.

Q. A little louder. What is it? A. Mechanical engineer.

1218 Q. Were you connected with the Lefcourt organization at the time of the erection of the building on 59th Street? A. I was.

Q. What connection did you have with the project? A. Mechanical engineer.

Q. And what did you do in that connection? A. I worked in conjunction with Mr. Kingsley in the preparation of the plans and specifications and then issued the plans for estimates, calculated the estimates for Mr. Haas, and then supervised the installation of the work.

Q. I did not hear the last part. A. Supervised 1219
the installation of the work at the building.

Q. Just what part of the building was the mechanical part; what did that include? A. Plumbing, heating, ventilating, electrical work.

Q. Do you remember that there was an addendum to the heating specifications eliminating radiators from interior bathrooms? A. I do.

Q. Do you know the inspector of The Prudence Company on that job? A. Yes, sir.

Q. What was his name? A. Mr. Schermerhorn.

Q. And did you see him there on the job from time to time? A. At least two or three times a week. 1220

Q. And what did you see him do on the job? A. Going around the different parts of the building, looking at the work.

Q. Did you see him inspecting the work? A. I did.

Q. And by "the work" do you mean the work in which you were interested particularly or generally? A. Both construction and mechanical.

Q. And did you see Mr. Schermerhorn there at any time when the floors only had cement between them, with the risers going to the upper floors? A. Yes, sir. 1221

Q. And did you ever see him inspect the risers? A. Yes, sir.

Q. Did you ever see him in the superintendent's office? A. Yes, sir.

Q. And what did you see him do there? A. Why, we would refer to the plans and specifications on any point in question; we would discuss the operation of the job or any points that we had to discuss for clearances, and so forth.

1222 Q. Did you have particular charge of the matter of the elevators? A. As far as the mechanical end of it is concerned; yes, sir.

Q. Did you have anything to do with the final inspection of the elevators as to their operation? A. Yes, sir.

Q. Do you remember being at the building shortly before the Lefcourt organization withdrew from it? A. I do.

Q. Do you know what the condition of the elevators was at that time? A. Practically completed, with the exception of one elevator.

Q. And what remained to be done on that ele-
1223 vator? A. Some of the enclosures, the doorways and so forth, on account of them having been used for a material hoist, it could not be completed as quickly as the others.

Q. What do you mean by "it could not be completed"?

The Court: Had not been completed, I suppose he means.

Q. Had not been completed? A. Sure.

Q. And what was required to be done before that would be completed, that elevator door? A. Some of the door operating equipment had to be
1224 adjusted, and so forth.

Q. Then would you say that the only work which was needed to be done to the elevator was a matter of adjustment? A. Yes, sir.

Q. And oiling? A. Yes, sir.

Q. Have you had experience before in connection with elevators and other mechanical equipment? A. Yes, sir.

Q. What would you say was the fair and reasonable value of work entailed in finishing that

elevator which you have described? A. Why, I should say for the adjustments and inspection, why, $2,500 would cover it. 1225

Q. With the use of that $2,500 you would have an entirely completed elevator system there? A. Yes, sir.

Q. Would you have any idea as to the reasonable value of removing and reinstalling pit equipment to permit waterproofing of a pit? A. Does that refer to just one elevator pit or—

Q. It refers to pits. I do not know how many pits there were. How many pits were there there; how many elevators, Mr. Youngson? A. Of course, you see in some pits you have two elevators, some of them single elevators. 1226

Q. Assume that the cost of waterproofing elevator pits was $225. Could you determine from that whether it was one or more pits? A. I should say it would be a single pit.

Q. Are you familiar with elevator pits, Mr. Youngson? A. Yes, sir.

The Court: And waterproofing elevator pits?

The Witness: Yes, sir.

The Court: What is the cost of waterproofing such an elevator pit as you find in the estimate? 1227

The Witness: Why, around $250.

Q. That would be for the waterproofing; is that right? A. Yes, sir.

Q. Is there included in that $250 the taking out and putting back in of pit equipment? A. Well, of course by taking out your pit equipment you might have to take out part of the roping on your elevators.

1228 Q. Then would you say whether or not $395 for doing that was reasonable or unreasonable? A. I should say it was reasonable.

Q. Were you familiar with the ice refrigerating system, Mr. Youngson? A. Yes, sir.

Q. There is a claim here that the compressor was repaired. Prior to Central Park going off that job will you state whether or not the refrigerating system had been completed? A. It had been completed and ran for several days in an operating test.

1229 Mr. Schenck: I thought that Mr. Murray had admitted these items. I thought yesterday you stated that the only items you questioned were the elevator matter and the painting matter.

The Court: But there is something about reasonable value.

Mr. Murray: Yes. I do not think I admitted it.

Q. After this installation had been completed and the testing, was the refrigerating system in every respect a perfect system? A. Yes, sir.

1230 Q. So that when the Central Park Properties went off that job there was no necessity for the repairing of a compressor? A. No, sir; it operated satisfactorily for several days.

Cross examination by Mr. Schenck.

Q. This estimate of yours of $2,500 to fix the Otis elevators—of course, the work on a patented article is a thing that has got to be done by the Otis Elevator Company, isn't it? A. Yes, sir.

The Court: Are you asking him as a matter of law or as a matter of mechanics? 1231

Mr. Schenck: Just as a matter of mechanics.

Q. And the only people who could properly put an Otis elevator in operative condition and finish the job were the Otis elevator people, weren't they? A. I would not say so exactly; no, sir. Any good elevator mechanics—

The Court: I do not know why that should not be so.

Q. They were the most appropriate people, at any rate? A. The most appropriate, yes. 1232

Q. How did you arrive at $2,500 as a fair price for putting this elevator system in perfect operative condition? A. Because the majority of the work was completed as far as adjustments were concerned and there was only just a little touching up to do, and oiling and greasing.

Q. You had never done that work yourself? A. I have not done that work myself, but I have seen it done for a number of years.

Q. In regard to the Otis elevator machinery and equipment you have never gotten anybody else except the Otis Elevator people to do the work, have you? A. At any time we let a contract to the Otis 1233 Elevator Company to install elevators they completed the job.

Q. So your estimate of $2,500 here is really predicated upon somebody else other than the elevator people doing the work? A. No, sir.

Q. You think they should have done it for $2,500? A. Yes, sir.

Q. And the fact that they did it for $14,000 you think is unreasonable? A. I certainly cannot see that value of work there.

1234 Q. How long have you been with the Central Park Properties or the Lefcourt organization, Mr. Youngson? A. I started with the Lefcourt people April, 1929.

Q. Do you know whether or not Mr. Walters who has ben referred to here was in the employ of the Lefcourt organization before he came into the employ of The Prudence Company? A. I understand he was.

New York, May 14, 1934.

1235 10.30 A. M.

TRIAL RESUMED.

Mr. Murray: If your Honor please, in reading over the minutes I noticed that there was a statement therein to the effect that a certain discussion we had regarding the admissibility of certain evidence did not take care of the question of pleading.

The Court: Did not what?

Mr. Murray: Did not take care of the question of pleading.

The Court: Oh, yes.

1236 Mr. Murray: Now, in view of the fact that there may be some question about the propriety of the pleading, I now desire to make a motion to amend the answer, if there is any doubt about the necessity of pleading separately in order to prove what I have in mind.

I have indicated at different points during the case, at different places during the case that I claimed that Prudence Company suffered no damage, if they received a building which was suffi-

cient security for their loan. I relied upon my general denials in the answer of any damage sustained by the Prudence Company. In other words, they alleged that there were certain incomplete items, which we denied. 1237

They alleged certain omissions and substitutions, which we denied; they alleged that the value of the building was decreased, which we denied; and in their second cause of action alleged the foreclosure of the mortgage.

Now, I have been proceeding upon the theory that under my general denials it was open to me to show by proof that, regardless of what the fact was as alleged by them, they suffered no damage because of the fact that the premises were sufficient security for their mortgage. 1238

Now, if there is any question about my ability to prove that fact under general denials, then I should like to amend the answer to set that up as a separate defense.

The Court: I think there is a good deal of question about your right to do it, in the light of the pleadings. I did permit you to adduce from witnesses the statement that the omission of these items did not damage the building, and that it was worth just as much without them as with them; but I do not think you can go any further than that. 1239

Mr. Murray: Then, I make the formal motion to amend the answer by pleading as a separate defense that even though there were these incomplete items alleged in the complaint, and the omissions and substitutions alleged in the complaint, that, nevertheless, the value of the building was sufficient security to protect the plaintiff on its mortgage.

1240 The Court: I will now hear Mr. Schenck.

Mr. Schenck: I do not want to oppose this application to amend on any technical ground. From the form in which the application to amend is made, however, it seems to me that it is bad in law,—the proposed amendment being that, despite the incompletions and despite the discrepancies, the building was sufficient to be security to the mortgage. That question of fact is entirely irrelevant on our contention under a completion bond.

I, therefore, oppose the amendment on the ground that it is legally insufficient.

I further oppose the amendment on the ground
1241 that, regardless of this limited form in which it is advanced, it is obviously made for the purpose of offering in evidence a multitude of building details in respect of which the defendants claim that the value of the building was in those respects increased, despite the decrease in the value by reason of the details made the basis hitherto of this litigation. In that respect I must claim unfairness on the part of the defendants, they having amended their answer at least four times to date, and three of those amendments being made the basis of various motions on the pleadings.
1242 They have given no excuse for not making this proposed amendment earlier; and I further submit that the defendants joining issue on such intricate matters of fact, after the plaintiff's case is in, and when it is in the midst of trial, is impossible. We can not now investigate the truth or falsity of these claims, and we have no opportunity to meet them.

I furthermore urge that the defendants should be precluded from making any such amendment

at the present time because of their suppression of the Switzer report. 1243

The Court: What is the Switzer report?

Mr. Schenck: The Switzer report is this report made by Keeler, Inc., through Mr. Switzer, after thirty days' investigation.

The Court: I shall deny the motion, Mr. Murray.

Mr. Murray: Exception.

ARTHUR JACOBS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows: 1244

Direct examination by Mr. Murray.

Q. With what concern are you connected, Mr. Jacobs? A. Lightolier Company.

Q. And how long have you been connected with the Lightolier Company? A. Twenty-two years.

Q. Can you state what the volume of business done by the Lightolier Company is and has been over a period of years, in comparison with other electric fixture manufacturers? A. I daresay that our company does more business than any other company in the lighting fixture field.

1245

Q. During your connection with the Lightolier Company has that concern furnished electric equipment to apartment hotels? A. We have.

Q. And are you acquainted with the type and quality of the electric fixture equipment in the hotels in the City of New York? A. I am.

Q. Did the Lightolier Company obtain a contract from the Central Park Properties Company

1246 for the installation of the electric fixtures in the building now known as the Hotel Essex? A. We did.

Q. How did you come in contact with the Central Park Properties in that connection? A. Why, we solicited the business—go after the business in the regular way. We have an outside salesman in the territory who upon receiving a building report from me as the sales manager follows up each particular operation until we reach a stage where we interest the prospective buyer in our merchandise.

1247 Q. After your first contract with Central Park Properties were you informed that you would have an opportunity to bid when the time arrived for the— A. We did.

Q. (Continuing.) For the making of a contract? A. We did.

Q. Ultimately were you requested to bid on the contract? A. We were.

Q. What did you do so far as examining the building and arriving at a knowledge of the type of building before making your estimate to the Central Park Properties? A. We studied the plans, as is customary, and figured in our own

1248 minds what we thought would be the proper selection of lighting fixtures for that particular operation.

Q. And did you thereafter show these fixtures to representatives of the Central Park Properties? A. We did.

Q. And where did you show them? A. At our showrooms.

Q. You ultimately received the contract? A. We did.

Q. And that contract was for the furnishing of electric fixtures above the first floor; is that correct? A. Correct. 1249

Q. Did you also bid on electric fixtures for the first floor? A. We did.

Q. Did you obtain that contract? A. We did not.

Q. Were the samples which you submitted to the Central Park Properties for installation above the first floor fixtures usual and suitable for such a type of building as the Hotel Essex? A. They were.

Q. Were the fixtures which were subsequently installed the usual fixtures installed in such a building? A. They were. 1250

Q. Do you know how they compare in quality and type with electric fixtures in other similar hotels in the City of New York? A. Very favorably.

Q. Assume that you were requested to install in this building electric fixtures costing $50,000. Would you say whether or not those fixtures would be suitable to such a building, or appropriate for such a building?

Mr. Judd: I object, your Honor.
The Court: Sustained. 1251
Mr. Murray: Exception.

Q. Did you mention what the price bid by you for the electric fixtures on the first floor was? A. I didn't up till now.

Q. What was that price?

Mr. Judd: I object, your Honor.
The Court: Sustained.
Mr. Murray: Exception. That is all.

1252 *Cross examination by Mr. Judd.*

Q. Mr. Jacobs, you spoke of these fixtures as being the usual fixtures for such a hotel. A. That is right.

Q. Do I understand that there are standard fixtures for apartment hotels? A. Standard type.

Q. Do you have one type of fixture which you sell for apartment hotels? A. Not in design, I might say, but in quality about the same thing, yes.

Q. Do you have in your showrooms fixtures of various qualities and various designs? A. We
1253 have various designs and various qualities.

Q. Do the prices vary with the design or the quality? A. Naturally.

Q. And what determines the price of a fixture in general? A. The amount of labor that may be put into it; the manufacturing of it.

Q. Have you the contracts here under which you furnished the fixtures for this hotel? A. Yes, I think I have.

(Witness leaves stand and returns.)

Q. May I see it? A. (Witness hands Mr. Judd paper.)

1254 Q. I see in this contract, Mr. Jacobs, numbers with reference to the units. Do these refer to particular styles of equipment? A. They do.

Q. Can you tell me in general whether the styles listed there are the best which you could have furnished for this hotel? A. The styles listed here are the best that we could have furnished in this type of job, I would say.

Q. If you had been paid more could you have furnished a different type? A. Well, we could

have—naturally, we could have furnished something that cost more if we were paid more. 1255

Q. Have you with you the correspondence which preceded the— A. I have not.

Q. Were there any letters between you and Central Park Properties? A. No.

Q. Prior to the entering into of the contract? A. No letters. It was all done by personal contact. Most of it was handled by personal contact.

Q. With whom? A. With the Lefcourt people and with us, by bringing them down to our showrooms and showing them what we had set aside for this particular operation.

Q. And did you show them various fixtures? A. 1256
We grouped what we thought would be the most appropriate fixtures for that job into one room and showed them the entire layout. That is the procedure.

Q. In determining what would be most appropriate you had in mind the amount of your bid, I take it? A. Well, we did not have any particular amount in mind. Our first object was to get the appropriate fixtures there.

Q. Had you made your bid before the fixtures were shown to the— A. Oh, no, because we cannot make bid unless the selection is final and def- 1257
inite. We never make a bid until Mr. Haas or whoever else made the selection either said, "Well, I like this" or "I don't like it". When they say they like it, then we go to work on that selection and figure that up.

Q. You spoke, Mr. Jacobs, of comparing the fixtures in this hotel with those in other apartment hotels in New York. Was the Savoy-Plaza among those which you had in mind? A. No, I

1258 had in mind hotels of a similar nature, the same type. For instance, we did the Park Central Hotel of New York.

Q. Do you consider the Savoy-Plaza Hotel of the same type as this one? A. No, I would consider the Savoy-Plaza Hotel a little better in type than this one.

Q. Would you consider the lighting fixtures of the Savoy-Plaza a little better than the lighting fixtures in this one? A. Not better. More expensive, perhaps.

Q. More in keeping with the Savoy-Plaza? A. Well, more expensive. I mean there is no limit
1259 to what you can put into lighting fixtures if you feel so inclined.

RICHARD PLAUT, called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Plaut, with what concern were you connected in 1930? A. Black & Boyd Manufacturing Company.

Q. What line of business was Black & Boyd in?
1260 A. Design and manufacture of lighting fixtures.

Q. Did Black & Boyd make a contract with Central Park Properties for the installation of first floor fixtures in the building now known as the Hotel Essex? A. They did.

Q. And prior to making that contract did you examine to see what type of building the Hotel Essex was, before submitting samples to Central Park Properties? A. Certainly.

Q. And did you display those samples to Central Park Properties? A. No, we submitted designs for the public rooms. 1261

Q. In other words, these particular fixtures were not what might be called standard fixtures? A. Not at all. They were specially designed and specially made.

Q. And were the designs which you drew and the fixtures which you subsequently manufactured in accordance with those designs the usual fixtures installed in a building of the type of the Hotel Essex? A. They were.

Q. What was the contract price in the contract for the installation of those fixtures? A. To the best of my recollection it was $8,600. 1262

Q. Is Black & Boyd still in existence? A. No, they were liquidated last year.

Q. Liquidated last year? A. Yes.

Cross examination by Mr. Schenck.

Q. Mr. Plaut, how long was Black & Boyd in existence? A. About forty years.

Q. Have you got the contract with you? A. No, I have not. When the company was liquidated certain records were destroyed, and I believe those were amongst them.

Q. Did you have charge of this negotiation yourself? A. I did. 1263

Q. Was there any correspondence on the subject? A. No, it was all done by personal negotiation.

Q. Did your concern install the lighting fixtures in the Savoy-Plaza Hotel? A. No, we made certain lamps for the various upstairs suites; table lamps.

Q. Nothing on the first floor, though? A. No.

1264 The Court: What is the point in reference to the Savoy-Plaza?

Mr. Schenck: There is some reference in the early correspondence that the Savoy-Plaza was a rather test comparison. Mr. Lefcourt lived at the Savoy-Plaza.

The Court: Correspondence between whom?

Mr. Schenck: Correspondence between The Prudence Company and Lefcourt. I am not pressing it in any detail, however.

Q. What was the course of negotiations by which the price of $8,000 was arrived at? Were your first designs that you submitted accepted?
1265 A. Not in toto. There are always revisions and changes made.

Q. No, I am asking in this particular instance, Mr. Plaut. Were there in this particular case revisions? A. Oh, yes.

Q. What was the first price; what was your first estimate? A. I don't remember exactly. Very close to the final price.

Q. And you do not remember whether the final estimate was above or below the first estimate? A. I believe it was slightly below.

1266 WILLIAM O. WHITNEY, called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Whitney, what concern were you connected with in 1929 and 1930? A. Brunswick-Kroeschell Company.

Q. Did the Brunswick-Kroeschell Company 1267
have a contract for the installation of a refrigerator equipment and system in what is now known as the Hotel Essex? A. They did, yes.

Q. Were you familiar with the installation of that equipment? A. I was.

Q. Was there any testing of that equipment made after it was installed? A. Yes.

Q. And were you present at that testing? A. I was not.

Q. Did you at any time examine that equipment after its installation? A. Yes, I have seen it since.

Q. When was that work completed, if you re- 1268
member? A. The plant was completel in October, 1930, and we notified Lefcourt's office that we were ready to run the test, on October 21st, I believe.

Q. From your examination and inspection of that system would you say whether or not the system was entirely complete and adequate at the time you left it there? A. Entirely so.

Q. And when you left there was there any necessity for any repairing to be done to a compressor or to any other part of that system? A. No.

1269

Cross examination by Mr. Schenck.

Q. Mr. Whitney, were you paid in full for your work? A. We were paid almost in full. We have a note, I believe, now for the balance.

Q. Do you happen to know how much that note is? A. It is roughly $2,100, I think.

Q. And what was the amount that you were paid? A. I could refresh my memory.

1270 Q. No, just generally. A. I think it was in the neighborhood of $12,600; something like that.

Q. When was the last time that you in charge of this negotiation saw this system? A. Well, I have been up there even recently on other work.

Q. I quite realize that, but I mean in regard to the system as you installed it. You were not there at the test? A. No, I was not. You see, the mechanics run a test, get the temperatures in the refrigerators, and they pull the amount of ice that was specified in this case.

Q. And what was the date nearest to the test that you were there?

1271 The Court: Is that subsequent to the test?

Mr. Schenck: No, before the test.

A. That I would not be able to tell you now. I could not tell you. That is only one of a great many jobs.

Q. Of course. A. And I would not be able to recall.

Q. What was the date nearest the test, after the test, that you were there? A. Well, I don't believe I could help you out very much there.

Q. When did you last see this system? A. Oh, within the last three or four months. We have

1272 done other work in connection with other changes up there. For instance, they recently put in—

Q. No, I do not think we are interested in that. A. (Continuing.) —a new restaurant and such things as that.

Mr. Schenck: I do not think we are interested in that. That is all.

DUNCAN MCNICOL, called as a witness on behalf of the defendants, being first duly sworn, testified as follows: 1273

Direct examination by Mr. Murray.

Q. With what concern are you connected, Mr. McNicol? A. S. H. Pomeroy Company, Inc.

Q. And what business do they have? A. Manufacturers of metal windows.

Q. Did the Pomeroy Company have a contract with Central Park Properties for the installation of metal windows in the building now known as Hotel Essex? A. They did.

Q. Is there any particular in which the metal windows manufactured by Pomeroy are different from the metal windows manufactured by other manufacturers? A. Well, the design of the Pomeroy standard type window, which was installed in the Essex House, is designed along the lines of a wood window; and it is especially adapted to that particular type of building. Also in conjunction with our window we have an integral weather flange, which obviates all necessity of calking. 1274

Q. And just what is a weather flange, and how is it placed in such a window? A. It is a part of the jamb; that is, the weight box and the head of the window, and it is built right into the masonry. 1275

Q. In your opinion, with this weather flange on your windows, is it necessary to do any calking of exterior windows?

Mr. Schenck: I object to that on the same—

The Court: What is the purpose of it?

1276 Mr. Murray: They claim that calking was necessary, your Honor, and one of their claims of damage is that the windows were not calked.

The Court: Is that in Schedule B?

Mr. Schenck: No, your Honor; Schedule A—an actual expense of ours to do this calking.

The Court: Objection overruled.

Mr. Schenck: Exception, if your Honor please. We are really confronted by the opinion of a salesman with regard to work that we found it necessary to do.

1277 The Court: If the ground of objection is that the salesman does not know and is not qualified, that is another matter.

Mr. Schenck: My objection is that this actual expenditure of calking is not met by the opinion of anybody. It is an expense which we found necessary to incur; and therefore, that expenditure is not to be qualified by the opinion of this salesman, who has never seen this work, but who thinks that his windows never need calking.

The Court: Just qualify the witness.

1278 Q. How long have you been with Pomeroy? A. About ten years.

Q. Are you familiar with the manufacture of these windows and the installation of them? A. Yes, sir.

Q. Just what have you done during those ten years for the Pomeroy Company? A. Well, I worked in various capacities. I did estimating work, supervised installation work, and more recently handled all the construction details between the contractor's office and our own.

Q. Are you familiar and have you been familiar with the installation of the windows themselves? A. Yes, sir; I have supervised that work. 1279

The Court: All right. I will overrule the objection, Mr. Schenck. Now, was calking necessary?

Q. Yes, in your opinion was calking of these windows from the outside necessary? A. No, sir.

Mr. Murray: That is all.

Cross examination by Mr. Schenck.

Q. Mr. McNicol, when did you last see these windows? A. Shortly before the job was completed. 1280

Q. And when was that? A. Oh, that must have been early in 1930.

Q. How early? A. How were they?

Q. No; how early in 1930, I say? A. Oh, I don't recall exactly. I just recall—of course we do hundreds of jobs in the city, and I just recall visiting this job when it was pretty well completed.

Q. Before you testified here you refreshed your recollection as to the facts and circumstances, did you not? A. On this particular job?

Q. Yes? A. No, I don't think so. 1281

Q. Did you examine the contract under which these windows were put in? A. Yes, sir.

Q. Have you got that here? A. Yes, I have a copy of it.

Q. Could you show it to me, please? A. Yes, surely.

Q. And any correspondence in regard to it. A. Yes.

(The witness left the stand and immediately returned with an envelope of papers, and handed some papers to Mr. Schenck.)

1282 Q. Now, this contract that you have shown me is dated January 4, 1930. Approximately how long did it take you to install these windows? A. Well, they are installed as the building is erected. In other words, as the brick work goes up, the windows are built right into the brick work.

Q. So that it is early in the stage of construction, as the building is being enclosed? A. They will start in when the brick work is going up on the first floor wall, and the first floor windows are installed; and when they reach the twentieth floor, the twentieth floor windows are installed.

Q. Could you say there having been given some
1283 proof here that this building was completely enclosed in June, 1930, that all your windows had been installed in June, 1930? A. Well, the job, at the time I last visited it, they were plastering most of the floors; and at that time the job was pretty well along.

Q. And would you say that was about in June, 1930? A. I could not say just what month it was or what time of the year.

Q. Between that time and this you have not seen those windows? A. No, I have not.

Q. And you did not see them after the plaster had been completely put around the windows? A.
1284 Oh, yes.

Q. Did you? A. At the time I was at the job, yes.

Q. And how long after the plaster had been completely put around the windows did you see the windows? A. Well, they were doing the plastering work at the time—some of it.

Q. So that the plaster was not complete the last time you saw them? A. Not in the entire building.

Q. You say you installed these windows. In your entire experience with S. H. Pomeroy & Company have you ever done any calking? A. We have on rare occasions. 1285

Q. That is, you have when necessary— A. No.

Q. (Continuing.) Calked your windows? A. No. In certain buildings an architect will insist on calking the windows.

Q. And then you will do it? A. That is right. It is sublet.

Q. You sub-contract the calking? A. That is right.

Q. And when an architect calls for calking, you do it? A. That is right. 1286

Q. Have you ever found it necessary to calk your windows when they are in towers or when the facade is exposed? A. No, sir.

Q. You never find that necessary? A. No, sir.

Q. Then, in your opinion, it is not necessary to calk them? A. If it were, we would be advised of it by the contractor—that there was leakage at the building, and we would be glad to make an examination of them.

Q. And then you would go and do the calking? A. We have never found it necessary. We have never been called upon to do it.

1287

Q. You have never been called upon to do that at all? A. No.

Q. And you have sub-contracted the calking of your windows? A. On rare occasions.

Q. Where the architect required it? A. That is right.

Mr. Schenck: That is all.

(Witness excused.)

1288 JOSEPH FEYTEL, called as a witness on behalf of the defendants, being first sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Feytel, with what organization are you connected? A. Alef Corporation.

Q. And what is the Alef Corporation? A. A trusteeship.

Q. A trusteeship for what? A. For the benefit of Mr. Lefcourt's creditors.

Q. And just what do you mean by that, Mr. Feytel? A. The Alef Corporation was formed
1289 and took over all of Mr. Lefcourt's remaining assets and liabilities, with the intention of paying off all these contractors.

Q. Now, is there among the Alef files a contract between the Otis Elevator Company and the Alef Company regarding the payment of the contract price for the elevators at what is now known as Essex House? A. Well, there is an agreement between Alef Corporation and the Otis Elevator Corporation in regard to the payment of the balances due them on these various companies.

Q. May I see that? A. Yes (handing Mr.
1290 Murray).

Mr. Murray: I offer in evidence an agreement between the Alef Corporation and Otis Elevator Company (handing paper to Mr. Schenck).

(Paper marked Defendants' Exhibit Q.)

Q. What payments, if any, were made by this Alef Corporation to Otis Elevator Company? A. Twenty and one-half per cent. of the remaining balances as we took them over.

Q. Is there anything showing when this contract 1291
was made between Otis Elevator Company and the Alef Corporation? A. April 15, 1931.

Q. Does that show the date when that was made? A. Between Alef and Otis, yes.

Q. Have you got any figures to show what was due and owing to Otis Elevator Company on its original contract on or about December 16, 1930? A. Yes, sir. Central Park Properties—the Otis Elevator's claim against Central Park Properties was $80,440.83; and that amount with various amounts on other companies gives a grand total of—

Q. That amount and what? A. That balance 1292
and the balance on other companies of Lefcourt's totalled $135,000, which is agreed upon in that agreement.

Q. And what was the original contract price of the Otis contract? A. $215,000.

Mr. Murray: That is all, Mr. Feytel.

Cross examination by Mr. Schenck.

Q. Of course, these figures that you have given us have been gotten from the Otis Elevator Company, have they not? A. No. They have been taken from the Lefcourt records. 1293

Q. Oh, I see. Without going into the terms of this agreement, Mr. Feytel, it is shown in evidence in this case that in the early part of January, 1931, Otis Elevator Company filed a conditional bill of sale against this particular building, and that Central Park Properties called the attention of these two surety companies, the Fidelity & Deposit Company of Maryland and the American Bonding Company, to that fact—rather, The

1294 Prudence Company called that fact to the attention of these two surety companies, and they wrote a letter that they would take care of it immediately. In any of your dealings in this matter did you find that the surety companies had done anything with regard to that conditional bill of sale or done anything in regard to that indebtedness of Central Park Properties to Otis Elevator Company? A. I have no knowledge of that.

Mr. Schenck: That is all.
(Witness excused.)

1295 DAVID KRAUS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Kraus, what is your business? A. Carpenter contractor.

Q. Are you the gentleman who had a contract with Central Park Properties for the doing of certain carpentry work on the building now known as the Essex Hotel? A. Yes, sir.

Q. When did you complete your work? A. De-
1296 cember 5, 1930.

Q. And when did you start your work? A. May 5, 1930.

Q. Did you know Mr. Henry Mark in his lifetime? A. Yes, sir.

Q. Did you prior to December 5, 1930, see Mr. Mark at the building? A. Yes, sir.

Q. And did you have a conversation with Mr. Mark at that time? A. Yes.

Q. And what was that conversation? A. Well, first, Mr. Henry Mark and myself, we were very

friendly, and we talked about other private business. Before he left he asked me my opinion how much the building is finished, so I said it is practically finished, with little odds and ends to be done yet. 1297

Q. Did he say that he had come up to the building for any purpose? A. Well, he just said that he never goes to building, but at this particular time he just wanted himself to prove to himself how far the building is progressed.

Q. Prior to December 5, 1930, how often were you on the job? A. Every day.

Q. And for a period of two weeks before December 5, 1930, did you see any inspector of The Prudence Company on the job? A. One particular inspector I saw almost every day—Mr. Schermerhorn. 1298

Q. And did you see any other inspector? A. I saw Mr. Billsborrow quite often.

Q. Now, I am talking specifically of the two weeks before December 5, 1930. What inspectors in addition to Mr. Schermerhorn did you see on the job during those two weeks? A. There were quite a few—about three or four, including Mr. Billsborrow, who were going around the building and checking off things. 1299

Q. What did you notice them do? A. Just writing down in books and checking.

Mr. Murray: That is all.

Cross examination by Mr. Schenck.

Q. You did not follow them around, did you, Mr. Kraus? A. No, sir.

Mr. Schenck: That is all.

(Witness excused.)

1300 Mr. Murray: I will recall Mr. Banfield to the stand, if I may, your Honor, for some additional questions.

The Court: Yes.

ROBERT P. BANFIELD, recalled:

Direct examination by Mr. Murray.

Q. Mr. Banfield, is there more than one way in the construction of a building of providing for means of keeping a carpet on the floor? A. There is.

1301 Q. And what are those ways? A. One particular manufacturer has a way of glueing it; to put down strips and nail the carpet to them; or you can plug the floor; that is, drill holes in the floor, and insert wooden plugs, for the purpose of nailing the carpet down.

Q. What is the Kellastone manner? A. The Kellastone manner is a continuous strip around the room, for the purpose of nailing.

Q. And what manner did the Lefcourt organization contemplate using for the fixing of carpets on the floors?

1302 Mr. Schenck: I object to that—what they contemplated.

The Court: Do you mean the specification or what they had in contemplation? That is a pretty broad term. Either what they did or what specification provided may be relevant.

Mr. Murray: Well, the time never arrived for them to actually put any—

The Court (Interposing): I sustain the objection.

Mr. Murray: Exception.

Q. Now, what is this sanitary cove in a cement base? A. It is a means of putting a cement base to eliminate a square corner. The corner is rounded off for sanitary purposes, to keep dust and dirt from accumulating in the corner. 1303

Q. And what is the appearance of that? A. I can draw it for you better than I can tell you.

Mr. Schenck: There is a drawing of it on the board now.

The Witness: Well, that is not so good, I think. There is a well, and there is a floor (marking on blackboard). An ordinary cement base is something like that (indicating). Now, there is the wall, and there is the floor (marking on board), and a sanitary cove base is installed like that (indicating). 1304

Q. So that is it a fact that where the carpet would come closest against the wall, there is a curve? A. That is correct.

Q. And will the carpet lay flat both against the floor and against the base? A. When you have a sanitary cove there is practically no means of determining the exact point to stop the carpet. In other words, it can not butt up against a flat or vertical surface.

1305

Q. You saw the building or did you see the building shortly prior to December 20, 1930? A. I did.

Q. I show you now Plaintiff's Exhibit No. 84—

The Court: That is Schedule A?

Mr. Murray: Yes, Schedule A of the complaint, Mr. Banfield, and ask you whether you are familiar with the different items of work

1306 mentioned on that schedule (handing witness)?

The Witness: I am.

Q. How long in your opinion would it have taken to have completed these different items listed on Schedule A? A. Between four and eight weeks.

Mr. Murray: That is all.

Mr. Schenck: No questions.

(Witness excused.)

1307 ANDREW G. SCHNEIDER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Schneider, what is your position with the Fidelity & Deposit Company of Maryland? A. Assistant secretary.

Q. And were you assistant secretary in March, 1933? A. I was.

Q. I show you an original amended answer in this action, and ask you whether that is your signature thereto (handing witness)? A. Yes, it is.

1308 Q. I now call your attention particularly to paragraph 12 of that answer, and ask you from whom you received the information upon which that statement was based (handing witness)? A. This information was obtained from our company's counsel.

Q. Your company's counsel? A. Yes.

Q. And who is that? A. Mr. Thomas E. White.

Q. Did you have any independent reports or any independent information before you other

than Mr. White's statement to you, when you verified that answer? A. No, I did not. 1309

Q. I show you now paragraph 20, and ask you where your information came from upon which that statement was made (handing witness)? A. It also came from Mr. White, our attorney.

Mr. Murray: That is all.

Mr. Schenck: No questions.

(Witness excused.)

PELL THOMPSON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows: 1310

Direct examination by Mr. Murray.

Q. Mr. Thompson, what is your business? A. I am vice-president of Pease & Elliman. Real estate business. My particular line of work in the last few years has been appraisal.

Q. And you have been connected with Pease & Elliman how long? A. For nearly thirty years.

Mr. Murray: Your Honor, instead of going through a long examination of Mr. Thompson, I might state the purpose of his testimony so that if it is not admissible we can avoid going through a series of questions. 1311

The Court: Yes.

Mr. Murray: I would hope to prove by Mr. Thompson that on December 16, 1930, the building in its incomplete state and the premises had a value in excess of the amount of The Prudence Company's mortgage, and that by reason of that fact The Prudence Com-

1312 pany could not sustain any damage, by reason of the fact that the building was incomplete or that there were omissions and substitutions. This testimony is in accord with what I stated to your Honor at the opening of court this morning, as to what my theory was, and that if it were necessary to amend the answer to plead such a defense that I would ask your Honor to do so. Now your Honor has denied my motion to amend the answer, and the question now is whether Mr. Thompson's evidence would be admissible.

1313 Mr. Schenck: My objection to the evidence is, first that it is not within the pleadings, second that it is legally irrelevant, involving possibilities of advantage and damage from elements of the transaction that were not bonded by the surety company. That of course is a very broad issue. The surety company does not bond the repayment of this money, and the inclusion in the problem of loss of the real estate and varying real estate matters is something that we deem entirely irrelevant in this controversy.

1314 If your Honor has any doubt on the subject I should like to argue that matter a little further. Then there is a third ground wherein we object to testimony of this nature from this witness, and that is that inasmuch as The Prudence Company has a deficiency judgment against the Central Park Properties, the principal on this bond, for over $700,000, the opinion on the part of any witness as to matters of value which have been enumerated in this

deficiency judgment is entirely irrelevant and incompetent. 1315

The Court: When was the property sold?

Mr. Schenck: The property was sold—

Mr. Murray: March 17th.

Mr. Schenck: March 17th.

The Court : Of 1931?

Mr. Murray: Yes.

Mr. Schenck: Of 1931.

The Court: Irrespective of all questions of your right to adduce proof of this sort, and without any reflection at all upon the qualifications of this witness which I assume are of the highest, I cannot picture a situation in 1316 which the weight to be attached to such testimony can outweigh the result of the foreclosure sale.

Mr. Murray: That would be a mere matter of weight, your Honor. Possibly your Honor as a trier of the fact would find that even though Mr. Thompson testifies that the value was in excess of the principal of the mortgage, nevertheless—

The Court: That does not go to the competency of the testimony; it goes to the weight. I point that out.

1317

Mr. Murray: Yes.

The Court: And I would say almost without hesitation now that the opinion of any expert would not weigh with me very much, if at all, as against what took place at the sale.

(Further argument of counsel is omitted.)

The Court: In the first place, was there a market for a hotel of that kind, the sale of a hotel of that sort?

1318 Mr. Murray: That is one of the underlying questions, of course.

The Court: That is a fundamental question in determining value.

Mr. Schenck: If your Honor please, it seems to me that this defense in reality is a defense of payment. The bond in our particular case, to limit it somewhat to one class of damage, gives the surety company the right to complete; if it does not, it gives The Prudence Company the right to complete, and specifically provides that we may have our expenditure in completion with six per cent.
1319 from the date of the expenditure. Here the indebtedness has not been paid in full, and as proof of that fact we have this deficiency judgment of $700,000. It seems to me idle to discuss the question. We have not been paid, and if Mr. Murray contended that we had been paid we might have pleaded payment, because that is an affirmative defense.

The Court: I shall sustain the objection on all the grounds stated. You have your exception noted.

Mr. Murray: Exception.

1320 Mr. Murray: The defendant rests, your Honor. I renew my motion to dismiss.

The Court: You do not have to renew any motion now.

PLAINTIFF'S CASE IN REBUTTAL.

Mr. Judd: There are just a few points to cover up in rebuttal, your Honor.

JACOB H. LANDSMAN, called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows: 1321

Direct examination by Mr. Judd.

Q. Mr. Landsman, what is your occupation? A. Painting contractor.

Q. How long have you been in that business? A. Twenty-one years.

Q. Can you tell us what sort of work you have done? A. The better grade of work in New York.

Q. Can you tell us a few of the buildings on which you have worked? A. The St. George Hotel, a job that amounted to almost a hundred 1322
thousand dollars; then the Phipps Estate, a job of about fifty or sixty thousand dollars; the Alden Hotel, amounting to about forty or fifty thousand dollars.

Q. What has been the nature of your personal connection with these painting jobs? A. Management. I am personally in contact with the men on the jobs; visit them in the day, twice or three times a day.

Q. Can you tell me whether in the Spring of 1931 you visited the Essex House on West 59th Street? A. Yes, by invitation to figure that job.

Q. Will you tell us what you did there? A. 1323
Well, first of all we went through the entire building, on account this building was not half-finished, and we had to go through room by room. Generally we figure a new job by the foot, or by the room.

Q. Will you tell us particularly in what state the painting was on the walls of this building when you first examined it? A. We examined when we went through the building starting with

1324 the ceiling. We found that they were stained. I am talking from the second floor up; not the first floor, not including the freight halls, the service halls, what they call them, certain parts. The ceilings was defective, not properly filled up, cracks or little holes, which is visible when you put on lights.

Q. The little holes in the ceiling? A. Yes. And then the calcimine itself was not thick enough to cover the surface. And that is with the ceilings. Then with the walls—

Q. Will you tell us about the walls in the building? A. The walls were found in very bad shape.

1325 Some rooms had two coats of paint, some rooms had but one coat of paint, and we considered sometimes one coat of paint enough to cover a surface but sometimes when we found two coats of paint do not cover, as they apply very thin and not mechanically, and we find that was smeared over, and calcimine spots, which is usual when the painter gets through the ceilings, washing it off, that was not done, and we have to rectify that; we have to rip it out with the plaster and sparkle that, and so forth. We found on the walls lots of small plaster with little pimples, which when you finish the work you cannot see that on the

1326 first or second coat, but you finally see on the last coat. Examined spots and so forth which is defective, and you have to rectify it. You have to rectify it and rip out the whole paint and take off those lumps and get the sparkle out, to make the smooth finish.

Mr. Murray: Is that an answer to your question, as to how he found the state of the walls?

Mr. Judd: I asked how he found the state of the walls. If you want me to ask my questions in more detail, I will. 1327

Mr. Murray: He is telling what he had to do.

The Witness: That is how I found it.

Q. Would you say from your observation of the walls they had ever been sparkled? A. Very little. Very little. Some rooms had only—very light rooms, like the corners, the large rooms, we find a little work done properly, but the rest of the rooms, the smaller rooms, was not properly and not mechanically at all done. The same thing applies to the trim. The trim is all fireproof stuff, and this is in course of construction, when you install that work, you see, when you put up the partitions, the buck partitions, they install those bucks, and by doing that process and the building is going on, that gets a little rusted and defective, and this has to be done in a proper manner before applying paint. 1328

Q. Mr. Landsman, I show you Defendants' Exhibit I, and ask you if that is the contract for the painting work on these premises (handing witness)? A. I think that is the contract I signed.

Q. I call your attention to a provision in here for sparkling all walls, due to the removal of panel moulding throughout the building (indicating). Is that the sparkling of which you have just been speaking? A. No, those mouldings would be on the walls, and always we find fine cracks between the walls and the mouldings, which we have to sparkle that out and make a sufficient job it would not look dark spots, and so forth. I do not think this increased 10 per cent. more, on the sparkling on the walls. That is all I think 1329

1330 I did by removing same and plastering up those holes where the nails was pulled out.

Q. What would you say was the reasonable cost of the sparkling and the first coat of paint over the portion where the panel moulding had been? A. Well, I would say by doing it while we are in the room, we generally apply a thin coat of shellac instead of priming it, and we apply the second coat of paint on the same, throughout the room.

Q. I do not think that quite answers my question. I was asking what you would consider the reasonable cost of doing all the sparkling and
1331 shellacking of the— A. The cost of this work?

Q. Yes. A. By removing the moulding? I told you about 10 per cent. increase above. If these mouldings would remain we have to plaster all this—when the moulding is put down, and especially that building was not properly I suppose heated and so forth, and it gets wet and dry, and the moulding pulls away from the wall, and we have to fill up those cracks. And I think it is 10 per cent. increase, by removing this moulding, to do that work.

Q. Can you tell us how the labor of sparkling of which you have spoken, the entire room, com-
1332 pares in amount with the work of putting on the first coat of paint? A. You see, when we go into a room we have to examine specially. We find all the lumps from plaster, cement and so forth, and scrape that off and sandpaper it down smooth, and then we sparkle. Sometimes we have six rooms a day a man can do, and sometimes eight. In the bedrooms we find eight.

Q. Is that work, then, that is more or less involved in putting on the first coat of paint? A.

Well, when we generally put on the first coat of paint, you know, when there is only a little plaster on the wall, and when you apply any paint it makes it harder. You take it off and make a smooth finish. By applying the paint. There is very little attention needed to that bare surface. 1333

Q. About how many rooms a day can a painter paint with the first coat? A. On the priming coat from twenty to twenty-two rooms.

Q. And you say in sparkling he covers how much? A. Six to eight rooms, if it is a good man. This brings up the smooth job.

Cross examination by Mr. Murray. 1334

Q. When did you start working on this job, Mr. Landsman? A. I think the first payroll of ours was May 1st.

Q. Have you got your daily worksheets? A. No, I did not take it along, but I have my weekly payroll here.

Q. May I see it? A. Yes (handing Mr. Murray).

Q. There is an item here May 1, 1931, 77. What does "77" mean? A. That is 77 days labor.

Q. And then "½". A. That is half a day.

Q. What does the seventy-seven and a half days apply to? A. It applies to $13.20 each day, at that time. 1335

Q. Does this seventy-seven and a half days, then, include the time for all the workmen employed; is that right? A. Absolutely.

Q. Then explain how you arrived at seventy-seven and one-half days for May 1, 1931. A. We have a timekeeper on jobs like that and he checks off the men every day, twice a day, in the morning there when they start and he comes there around three o'clock and he walks through the job and he gives in every day the time in the office.

1336 Q. You do not show how many workmen were on the job, do you? A. No. Sometimes there is 25, sometimes 30, sometimes 50. If you need it I will bring it, I will exhibit it.

Q. Is there any means of determining from the seventy-seven and one-half days for a week how many workmen were employed? A. Well, if you want to exhibit that I will have to go down to the office and take it out of the books.

Q. Is seventy-seven and one-half days the total time of all the workmen employed there during a week? A. Yes, sir.

Q. Is that it? A. Yes.

1337 Q. Added together? A. Yes, sir.

Q. How many hours a day in the workday? A. Eight hours at that time.

Q. And how many days in a week? A. Five days.

Q. So that just for computation purposes if you divide 77½ days by 5, do you get the amount of time spent on an average for each of those 5 days? A. No, I would not say that. Sometimes we started Monday with three men, and Tuesday we increased to five men, and Wednesday we had already fifteen men, and Thursday we might took away ten men.

1338 Q. But you missed the words which I used, "On the average", Mr. Landsman. A. On the average, yes.

Q. Is there any simple way of your arriving at how many men were on the job from day to day? A. Oh, yes, we have books for that. We have time books and original books.

Q. Have you got any other record with you which would show in any other form? A. No, I did not take along. I only took along the time books.

Q. You have stated that your firm does better grade work. What did you mean by that? A. If anybody wants our service and we figure a job, we always get all the prices—or we get a little more as the next man. 1339

Q. In other words, your cost of doing the work, to an owner is higher than the cost of other contractors? A. Not exactly on every case.

Q. Do you do the best painting work in New York? A. Well, I would not say that. There is still better than me. There is no ground for painting. You paint a room and spend $2,000 and you can paint the same room for five or fifteen dollars, too. 1340

Q. Is there any contractor in New York more expensive than you? A. Oh, yes, when it comes to decorations.

Q. No, I mean plain painting. A. Well, there is indeed. They might have a bigger overhead than me. I don't know what they figure.

Q. But outside of the overhead there is no more expensive painter in New York than you? A. No, I would not say that.

Q. When did you paint the St. George? A. A year previous, or a year and a half.

Q. A year previous to what? A. About 1929.

Q. Was that a Bing & Bing job? A. Yes. 1341

Q. Do you do most of Bing & Bing's work? A. No, I didn't do no work for them in the past—since 1925.

Q. How did the cost of labor and material in 1929 compare with 1930? A. I think there was an increase. At that time in 1929 we paid $12, but at that time there was a strike and they increased it to $13.20, the painters. That was in 1928 or 1929. This I could not recollect myself.

1342 Q. Was it in 1929 you did the St. George? A. Some time between 1928 and 1929.

Q. And wasn't the cost of labor and material at that time at its highest? A. Not in the painting line. If I could recollect myself, we had a little strike and they settled quick, the association, and you see I did not take no active service much in that job, as my brother. I used to only visit once a day. My brother, who actually took on that job, had more than me. I don't know the details so much. You see, this job happened and I was there twice or three times a day.

Q. I am talking about the cost of labor and the
1343 cost of material in 1928 and 1929. Wasn't the cost of labor and material at that time the highest that it has ever been? A. No, not in the painting line, because labor—materials were the same.

Q. Because what was the same? A. The material was the same. The material, the painting material.

Q. In other words, the painting material which you purchased in 1928 and 1929 was no higher than what you purchased since; is that right? A. That is right.

Q. So that since 1928 and 1929 the cost of painting material has not dropped in the slightest? A.
1344 In certain various little things a drop, but not in the main item.

Q. In what has it dropped? A. For instance, in colors. But the main item what we use, the flat stuff, the lead, did not drop very much. Very slight.

Q. Did it drop? A. Very slight.

Q. How much did it drop? A. For this I have to take records for the last four years, my dear man. I could not remember all those things.

Q. Can't you tell us how much it costs you from year to year to do your business or do a job? A. Yes, but this is four years back, you are recalling or five years back. 1345

Q. Will you admit that the cost of material dropped a little bit after 1929? A. Yes.

Q. Will you admit that? A. Yes.

Q. How about the cost of labor? A. Labor, I will look it up and show it to you. I think that since 1928 the labor increased.

Q. When did it increase? A This I will have to look up the records. I know we only paid in 1927 and 1928 $12 a day, and that was the association, which they settled for, $13.20. 1346

Q. You have been in this business how long? A. Oh, about twenty-one years.

Q. And the cost of labor is one of the material items in carrying on your business, isn't it? A. Yes, sir.

Q. And yet you cannot tell me whether the cost of labor remained the same in 1928 and 1929 and 1930, or whether it went down or went up? A. Well, approximately I think it is the same thing. I know a fact that we only paid in 1926 and 1928 $12, and then it was a strike and the association settled for $13.20. In the same year we had the Phipps Estate, and that is what we know, we did a job at the same time, and we paid $13.20 a day. 1347

Q. How much was labor; how much did it cost in 1931 when you did this job? A. It cost $13.20 a day.

Q. And how much did it cost when you did the St. George? A. I don't know, to say if it was the same money. I would have to look up the records.

Q. How many rooms are there in the St. George? Oh, there was there about—I don't re-

1348 member exactly. That is the new extension we made. About I presume nine to a thousand rooms.

Q. Nine hundred to a thousand? A. Yes, something like it.

Q. Is that in the old hotel or the extension, or both? A. The new hotel. The new extension.

Q. How many rooms were in this Essex House? A. About twelve-hundred.

Q. Did you know in 1929 and 1930 the Globe Painting Company? Did you know the Globe Painting & Decorating Company? A. I knew the man, Mr. Gladstone, personally.

Q. You knew Mr. Gladstone? A. Yes.

1349 Q. You knew it was he who had done this job at the Essex before you came in? A. Yes, I know that.

Q. What was his reputation in the trade? A. I would not say that. I would not state that. I would not condemn a man and I would not say he is the best or he is the worst.

Q. Haven't you any idea what his reputation was? A. Your Honor, do I have to answer that question.

The Court: You can say if you know. Do you know what his reputation was?

1350 The Witness: His reputation was fair. I didn't have much dealings with him.

Q. Now, I understood you to say that the painting job was not half finished when you looked it over in May, 1931, or in April, 1931? A. No.

Q. When was it in 1931 that you went to the job? A. About the 5th or 6th of April.

Q. And the painting was not then half finished? A. Some of the rooms were not start, like the sec-

ond and fourth floors, where they had all the lockers, and there was still all junk laying there. 1351

Q. There was no paint on the walls? A. On the walls, certainly not. Some of the rooms there was no paint at all.

Q. Anybody who came in could see that there was no paint on the walls, is that right? A. On those second and fourth floors, yes.

Q. Where there was no paint, anyone could see that? A. Yes. Some of the rooms were locked, and you couldn't get in there; there was tool boxes in there, and they didn't want anybody to touch them. After we examined the entire job, we had a key, and we went in and saw those rooms. 1352

Q. Did you use any of the paint which was already on the walls, or did you an entirely complete job? A. Well, I wouldn't say we used the paint on the walls. The way that you apply paint, the paint was applied not in a mechanical way.

Q. Not in a mechanical way? A. No.

Q. How many coats did you put on the walls? A. We found some rooms that had to have three coats too, because it would not cover.

Q. How many coats did you apply in other rooms? A. In certain rooms two coats.

Q. And in those rooms where you put on two coats, was any use made of the paint which was already on the walls? A. Well, only as I said before, as a primer, which reduces almost four times as much as when you have to start and finish by preparing a job. 1353

Q. Let me get that again: What about this primer, and what about four times as much? A. When we apply a second coat of paint to make a smooth finish, this has to be prepared with sandpaper, to sparkle it and apply a heavy coat of

1354 paint to cover all the defects; but when we apply a coat of primer, we want to scrape off the little lumps, to make a finish on the walls.

Q. So that in putting on your finish coat of paint you always use sandpaper to scratch off these little lumps? A. No; we have to use sparkle, and then scratch it.

Q. Well, what is the final coat of paint? A. First you apply—for instance, we sparkle up with sandpaper in some cases to make it presentable, and we have to apply a coat of glue size, and then a coat of lead and oil paint, to make a uniform surface. Then we apply a coat of flat paint, and
1355 stipple it to make it presentable to move into.

Q. The last is the stippling, is that right? A. Yes.

Q. And before that what is it? A. Lead and oil.

Q. And before that is what? A. A primer.

Q. Now, assume that you have a primer on the wall, and you are going to apply lead and oil, the final coat; did I understand you to say that you used sandpaper to go over it to get these little lumps off? A. It is not only sandpaper, but when you find conditions as they were there, you have to scrape off those lumps, and start a little ahead
1356 to stipple it more, to keep out a little more plaster than usual, when there is no paint on it.

Q. Is this sandpapering and those other things which you have spoken about—would you consider that part of the final coat? A. No, that is part of the preparation, preparing for it.

Q. Then, that is the preparation for the final coat? A. For the second coat.

Q. Well, what is the stipple? Is the stipple a coat at all? A. We have to make a smooth surface, you see.

Q. Is the stipple a coat of paint? A. The stipple is to make a uniform color and uniform shade on the walls. 1357

Q. But is it a coat of paint? A. It is, indeed, yes.

Q. Then, the stipple is the last coat of paint, is that right? A. Yes, that is right.

Q. And the lead and oil is the coat of paint just before the stipple, is that right? A. Yes, to make the surface smooth, and so it will not be observed.

Q. Do I understand you to say that when you put on the lead and oil paint before the stipple, you do those things that I have mentioned? A. Yes. 1358

Q. The sandpapering and so forth? A. Yes, and sparkling and plastering what is necessary.

Q. Now, you say that above the second floor the ceilings were stained. What were they stained from? A. It seemed to me of moisture.

Q. From moisture? A. Yes, in my opinion.

Q. And where would that moisture come from? A. I think by not proper ventilating during the winter time. If the weather is changeable from hot to cold, and usually in a new building it is not properly ventilated, I think that causes it.

Q. And would that be caused by an absence of heat? A. By an absence of proper ventilating. 1359

Q. And not necessarily heat alone, but ventilation? A. You have got to have a certain amount of heat too—not a high temperature. You know that the walls in a new building, if you walk in, you will find them all damp, if you have no ventilation and heat.

Q. Now, have you any independent recollection of how many rooms there were in which you had to start painting from the bottom up; in other

1360 words, with a primer? A. Well, you have got to be an angel today to remember that,—going through a job three times, with 1100 rooms, and 600 bathrooms. I think I would have to be a genius to do that.

Q. Have you any record to show that? A. When we figured the actual job, we figured this up. We go through this room and say we can finish it in 24 hours; and that is the only record, and that is put away somewhere.

Q. Now, I ask you whether you can tell me, whether you know how many rooms there were in that building where you put on three coats of
1361 paint? A. Oh, to make the job proper, a certain amount of rooms you have to apply two coats of paint, and the last coat is stippled, and if it does not come out right, and it is observed, you have to make patches, and to go over it and take some glue size and size it over again, and put on another coat of paint.

Q. But you do not know how many rooms there were of that type? A. Well, I would approximate about almost 40 per cent. of the work.

Q. So about 40 per cent. of the work already done you did not use at all as a base, is that right? A. Only on the last coat. The other work in con-
1362 nection with the wood work, the ceilings and so forth—

Q. When you say "40 per cent." you are now talking about— A. (Interposing.) The walls.

Q. (Continuing.) Those walls where you did not make any use at all of the prior coats? A. Absolutely.

Q. What kind of job were you told was wanted? A. The best that could be made of it.

Q. A perfect job? A. Absolutely.

Q. And with that instruction, you gave your 1363
estimate? A. Yes.

Q. Do you know what the original contract called for? A. You mean the specification? Not the contract?

Q. The original contract? A. I don't know about the contract. I saw it in the specification.

Q. What did the original specifications call for? A. It called for more work than I did.

Q. What did the original specifications call for as regards coats of paint? A. It called on the ceilings to apply three coats of paint, instead of kalsomine.

Q. And what else? A. On the walls some were 1364
three coats, and all the stuff that was necessary, and the same on the wood work.

Q. How many ceilings were there or what proportion of the buildings showed stains on the kalsomined ceilings? A. I would say almost 95 per cent.

Q. 95 per cent.? A. Yes.

Q. Now, even though the painting job had been perfect in the first place, stain could come through just the same, could it not? A. Well, if it would be shellacked or given a coat of alum size, which I presume only I found in corner rooms—four 1365
large rooms in each corner, where that was done —and put on a heavy coat of kalsomine, after it gets to be unusual weather like that, we find many cases that it stains a little after it dries out, and comes back; but this was put simply on plain plaster, and that plaster was poor plaster, with not enough gypsum to have the strength to keep the kalsomine on.

Q. Will you answer this question: Are you of the opinion that the kalsomine was put over the

1366 plaster before it was thoroughly dry yet? A. I don't say that, no. It was dry.

Q. How do you know it was dry? A. Well, I presume that when they make kalsomine ceilings, they know—the mechanics or the man who is in charge, he will not kalsomine ceilings on a wet surface, because when kalsomine goes on a wet ceiling, it shows right away, and spots and makes it right away yellow.

Q. Suppose that a painting job had to be done by a certain time: Is it not possible that the paint would have been put over a damp ceiling or on a damp wall or on undried plaster? A. There is a
1367 certain preparation, if you want to spend a little more money. I do certain work that I pay four dollars a gallon for a certain preparation, and I put on a coat of that stuff, and apply a coat of kalsomine, and it will stand for another year, just as well as if it was dry. I do that in many cases where people are in a hurry.

Q. But that would require extra work, would it not? A. Yes, it would.

Q. Now, what is rust? You mentioned that, did you not? A. Yes.

Q. What is rust? A. You see a fireproof door. You know what that is? That is iron—rough iron.
1368 When that stands for a time—a certain time—and a poor primer has been used, with not sufficient lead and oil in it, it starts in the corners especially, to rust—and you know what rust is on a piece of iron.

Q. Now, is it not the fact that because of the construction of the building itself there may be iron in the partitions— A. (Interposing.) No, you are wrong. It is that heavy wood work there. This is a 40-story building, and under the building

code they should have fireproof trim throughout the building. There is no wood in the building at all, and that applies to the doors and casings and jambs, and the windows and so forth. 1369

Q. Well, if I walk into a room today and see in the corners rust marks which have come through the paint— A. (Interposing.) Not in the corners, but we are talking about the trim.

Q. No. I am not talking about trim. I am talking about the walls. A. The walls are all covered with plaster. There is no rust that comes through on the walls. I did not state that.

Q. Well, is there such a thing as rust which comes through paint after it has been applied, because of the material which is underneath the plaster? A. There is a certain saltpeter, as we call it, which comes out from dampness in a building in certain places. We call that saltpeter. You see yellow spots on a wall running down, just like a yellow pine tree that gives out a substance, and that is what this is—the same. 1370

Q. Now, what did you do on your job in addition to the painting? You did something more than painting, did you not, on this job? A. We got paid for what we did.

Q. There was some papering, was there not? A. Yes, we papered too. 1371

Q. And where was the papering done? A. In the bathrooms.

Q. All the bathrooms? A. Yes.

Q. Anywhere else? A. In the public halls.

Q. In the public halls? A. Yes.

Q. What do you mean by the "public halls"? A. The corridors for entrance to all the apartments.

1372 Q. What is Lithophone base paint? A. That is a process made of Lithophone and Chinese oil and so forth. That is what they call for the last coat of paint.

Q. Did you use that? A. Yes, a better grade from the Keystone, which makes the best.

Q. That is the best there is? A. The best that is made in that class of material.

Q. How does it compare with white lead? A. Well, that is not for a final coat. White lead gives a base.

Q. What is used for the final coat besides Lithophone? A. In the olden days we used plain lead,
1373 about 25 years ago when I was a working man.

Q. Lithophone is used for a final coat? A. There is a certain amount of Lithophone in the material. It is not Lithophone itself.

Q. It is a Lithophone base? A. Yes, what we call "chalk".

Q. Is that for a final coat? A. They use—99 per cent. is used for a final coat in all the buildings.

Q. It is used for other coats besides? A. No; only in undercoating for enamel it is used, but it called by a different name; but Lithophone is the right name for it. I am not a chemist, you know.
1374 This is a chemical process, and it is only used 40 per cent.—

Q. In how many coats did you use Lithophone? A. In the last coat.

Q. In the last coat? A. Yes.

Q. Did you use it in next to the last coat? A. No, sir. That is the only thing that gives a smooth finish, and when we had to do over a room, we used that.

Q. Could you tell by an examination of the painting which you saw before you started to work whether there was any Lithophone base in any of the work which was there before you? A. Well, I am not a chemist. I couldn't say that. I would say there was not body enough of lead. 1375

Q. Did you know that the original specifications called for a Lithophone base in two coats of paint? A. I think if it did call for Lithophone to be used in a proper manner, it could be used, but not to make a real good job.

Q. But you only used Lithophone once? A. I used it on the last coat, yes.

Q. Did you paint the ceilings? A. No, we did not. 1376

Q. How many ceilings did you re-kalsomine? A. Almost practically the whole house.

Q. And that would be how many rooms? About 1200 rooms? A. I couldn't say that. I will show you the extras here (exhibiting paper).

Q. There were about 1200 rooms in this hotel? A. Something like that, yes.

Q. And you say that you re-kalsomined practically all of them? A. Almost all of them.

Q. And was the need for re-kalsomining caused in some instances by this strain you have spoken of? A. And a little defective plaster, which was not sparkle in the small halls, and in certain cases thin kalsomine which showed through the body. 1377

Q. What causes these pimples in the plaster which you have mentioned? A. By not cleaning up when you prime the walls.

Q. But what causes the pimples in the plaster? A. This is by mechanics working in a building doing a little cement work, patching in the rooms,

1378 and they drop a piece of plaster, and it slops up on the wall, and that is what caused it. He does not take the time to clean that off. Or a kalsomine man spots the walls, and they do not wash it off. It takes only about two minutes to wash it off, but it takes, after that, two hours to correct it.

Q. Mr. Landsman, on the St. George job the cost approximately was a hundred dollars a room; is that right? A. About.

Q. When you estimate on a job do you usually estimate on the basis of so much per room? A. The area. Take the area.

Q. Do you know what the area of the St. George
1379 is as compared with this? A. It was almost two rooms of the St. George for one of those rooms.

Q. What is that again? A. Two room space, very small rooms. The St. George Hotel is approximately a room there 10 or 9 by 14 by 15, and here is rooms the smallest is 12 by 18—the smallest.

Q. So that the rooms in the Essex House are larger than in the St. George Hotel? A. Almost by 60 to 70 per cent. larger.

Q. So that if you went in to bid on the Essex House originally on the basis of footage—is that what you call it—how much would you say you
1380 would charge per room? A. You see, we include all the exterior work and all the public work. I would presume that that job would amount, including bathrooms and closets, about over a hundred thousand dollars.

Q. The St. George with smaller rooms was a hundred thousand dollars; is that right? A. Nearly a hundred thousand. I did not say it is a hundred thousand.

Q. I have marked down here a hundred thou- 1381
sand dollars. How close to a hundred thousand dollars was it? A. Well, if I could recollect, my memory.

Q. And if the rooms were the same size as the Essex House rooms, how much more would it be? A. That would cost more.

Q. How much? A. Another twenty-five to thirty thousand dollars.

Q. So that you would get up to about $125,000? A. Yes.

Q. Or about $125 per room? A. Something like it.

Q. On the same basis in the Hotel Essex, at $125 1382
per room, what would the contract price be with twelve hundred rooms? A. Twelve hundred rooms, that would be about $135,000 to $140,000, something similar to it.

Q. Do you know that a contention is made here that the cost of doing the Hotel Essex job according to the specifications, would be about $90,000? Do you know that? A. Yes.

Mr. Judd: Excuse me. Your Honor, I do not think that is the contention. The question is the completion of it.

The Witness: I will answer that question. 1383

The Court: He says he has no objection to answering the question.

The Witness: The question, $90,000, what work was done.

Q. What is that, again? A. You see, those public halls and the outside. You see what I mentioned, the freight elevators. That was already finished and the $90,000 was excluding all that work.

1384 Q. So that do you understand the contention is that if the original work had all been done perfectly with two coats of paint, and that there remained only the final coat of paint to be put on, that the cost of doing that would be $90,000? A. To rectify the job.

Mr. Schenck: I think having the witness testify to contentions is a little aside from the point.

The Court: Mr. Murray, it is not going to be very persuasive whatever he says. The standards of comparison have not been accu-
1385 rately fixed. The witness says "about" and so on with respect to the St. George job, and I cannot get anywhere with his conclusions.

Mr. Murray: I am trying to get some basis of comparison, your Honor.

The Court: But, after all, when you get down to that why not ask particularly with reference to the basic or unit prices?

Mr. Murray: All right, your Honor.

Q. You have an idea, haven't you, Mr. Landsman, of proportionately how much the first coat, the second coat and the third coat cost? A. Not
1386 exactly. It is not machine work. When a man works a machine he knows that piece costs so much to manufacture. But when you have between sixty and seventy men, one is doing a little more and one is doing less, and you have to take the average.

Q. But in your experience haven't you arrived at some approximation of what that proportion is? A. Yes, new work, when I start the job myself.

Q. Let us assume new work, then. Approximately what is the proportion that the first coat

bears to the whole job, in a room? A. In a room 1387
the first coat of paint bears almost I would say about twelve per cent.

Q. And the second coat? A. About 38 to 40 per cent.

Q. And the third coat? A. Well, between the coats there is the sparkling and the preparation.

Q. Will you give me, then, the different steps, with their proportions? You have 12 now for the first coat, 38, was it, for the second? A. Yes.

Q. Tell me what the other items of work would cost, in proportion. A. About 25 per cent.—you know, it is not accurate.

Q. I am not asking you to tie yourself down. 1388
A. And then there is the finishing coat. One room takes a sparkle one hour and another four hours. You find more holes. It is a simple matter, and sometimes we gamble and we figure in the average.

By the Court.

Q. Suppose you estimate that the painting of one of these rooms is $100—that is, the cost $100. A. Yes, your Honor.

Q. Of that $100 what would you say was a fair amount to allow for the third or final coat? A. 1389
The second, the sparkling and the second, and the third coat is almost 88 per cent. The sparkling preparation and the second coat and the third coat is almost from 85 to 88 per cent., as the final coat.

By Mr. Murray.

Q. Can't you subdivide the second coat and the sparkling and the final coat into some percentage? A. We do once in a while, but not in a case like that.

1390 *By the Court.*

Q. Never mind what the case is. Suppose you had the St. George Hotel which you started to paint, and you figured that each room was going to cost about $100. At least that is the basis of your charge to the owner. How much of that $100, in dollars, would you say the first coat of paint represented? A. That is 12 per cent.

Q. $12? A. Yes.

Q. And the second coat? A. About $38, with all the preparations. You see you have—

Q. Never mind. Let me ask the questions.

1391 What is left, the third coat? A. The third coat and the stipple.

Q. Would that cost $50? A. No, that is between 25 and 28 per cent., and preparations between those coats.

Q. What is that? A. Like sparkling and sandpapering.

Q. Then as I have it, it would be $12 for the first coat, $38 for the second, $28 for the sparkling and miscellaneous things? A. Yes.

Q. And the balance is the third coat with the stippling? A. This includes also the public work.

Q. What is the public work? A. You see, there

1392 is halls, closets, windows, cellar work. That is figured in in this figure.

The Court: Well, that gives you the percentages.

By Mr. Murray.

Q. You said something on your direct examination, Mr. Landsman, about 20 to 22 rooms for one man. Do you remember that? A. Yes.

Q. What is that? A. That is the priming coat.

Q. One man could do 20 to 22 rooms in one day? 1393
A. Yes.

Q. And one man could do six to eight rooms of sparkling in one day; is that right? A. Yes.

Q. Have you any record to show what you paid for labor on this job? A. Yes, sir.

Q. Have you? A. Yes, sir.

Q. Where is it? A. Not here. I told you.

Q. May I see is? A. Not here.

Q. You have not got it here? A. No.

Q. Do you know what the proportion of labor was and what the proportion of material was? A. On this job, yes.

Q. What was it? A. About 22 per cent. 1394

Q. For what? A. For material.

Q. And how much for labor? A. The rest is the labor.

Q. 68 or 78 per cent.? A. Well, don't I have to make anything, too, on it?

Q. I was getting to that. How much do you take out for profit? A. Well, it happened this job only gave us about seven and a half per cent. net profit.

Q. How much would you say of the price was given over to the cost of labor and how much to the cost of material? A. Well, it is right here. You got my schedule there for the labor. That is 1395
easy to identify in there.

Q. (Mr. Murray hands witness paper.) A. That is a set compensation. Only on labor alone, except paperhanging. They paint a certain room, which costs so much. Now that is $51,136.80 actually paid to the labor.

Q. For painting alone, or painting and papering? A. No, papering I got out of it also.

Q. Is there included here anything for papering? A. No.

1396 Q. May I see what you have for papering? A. (Witness hands Mr. Murray paper.)

Mr. Murray: I offer in evidence these different instruments, which we shall clip together.

(Marked Defendants' Exhibit R.)

The Court: That labor item of $51,000 does not include labor for hanging the paper?

The Witness: No.

1397 SAMUEL ZILBER, called as a witness on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. Judd.

Q. Mr. Zilber, what is your occupation? A. Civil engineer and general contractor.

Q. Will you tell us briefly your training and experience? A. My experience is mainly in apartment hotels since 1922. For the last twelve years I am in the building construction game, as superintendent of construction, as an estimator, and I also award contracts to contractors.

1398 Q. Will you tell us where you were trained as a civil engineer? A. The Brooklyn Polytechnic Institute.

Q. Can you tell us the names of some of the apartment hotels on which you worked? A. The Hotel Oxford, 205 West 88th Street; the Hotel Bradford, 210 West 70th Street; Hotel Alcott, 27 West 72nd Street; Hotel Beekman, 63rd Street and Park Avenue, and Hotel Park Royal, 23 West 73rd Street.

Q. And in connection with these hotels you have received estimates and let contracts for all the construction work? A. Yes, sir. 1399

Q. Have you ever had experience in the completion of an apartment hotel which had been abandoned before completion? A. Yes, sir; the Hotel Beekman at Park Avenue and 63rd Street.

Q. Can you tell us briefly what peculiar problems there are involved in such a completion job? A. Well, there are all kinds of difficulties, but mainly it costs too much to finish the job.

The Court: A little louder, please.

The Witness: It costs too much to complete. 1400

Q. Because of what? A. First of all on account of the time the building deteriorates to a certain extent. You have to do certain work all over, as it was never done, and besides that extra charges for carrying it, and to heat it out properly, to ventilate it properly, to have watchmen, labor to clean it, and so forth.

Q. Is the supervision greater? A. Yes, very much. It is entirely different when everything is organized. The foreman knows where to send his men. It is like a machine, every day we know what to do. When it is abandoned one has to do something on the second floor, something on the third floor, something on the sixteenth floor; the work is scattered all around, and much more difficult to supervise. Each contractor, if he has twenty or thirty men on a job, it is sufficient for him to have one foreman; if it is an abandoned job and he has to resume the work he has to have two. And then there is more office work. 1401

1402 Q. Have you examined the Essex House which is the subject of this suit? A. Yes, sir.

Q. Have you examined the plans and specifications upon which it was agreed to be built? A. Yes, sir.

Q. I show you Plaintiff's Exhibit No. 85, that is the schedule of omissions and substitutions (handing witness), and ask you if you are familiar with that? A. Yes, sir.

Q. Have you checked the items in that schedule? A. Most of them.

Q. Are the items referred to in that schedule called for by the plans and specifications? A.
1403 Yes, sir.

Q. And are the quantities stated in that schedule the amounts shown by the plans and specifications? A. Yes, sir; computed by me.

Q. Can you state whether or not the amounts stated as the value of the various items are or not the reasonable cost of such items in 1930 or 1931? A. Yes, they are reasonable.

Q. I call your particular attention to the item Medicine Cabinets. Have you examined the medicine cabinets which are now in the Essex House? A. Yes, sir.

1404 Q. Are they in your opinion the best which could be obtained? A. Not at all.

Mr. Murray: I object to the question, your Honor.

The Court: Why?

Mr. Murray: It is not a question whether they are the best that could be obtained. They are only required to put in the usual.

The Court: What does the specification say about the medicine cabinets?

Mr. Judd: The specification allows $10,000 for medicine cabinet expense. 1405

The Court: Then ask him to describe them and state how they compare with others of that kind.

Q. Will you state what sort of medicine cabinets are there now and how they compare in quality with those in comparable hotels? A. They were very much of inferior quality, as the mirror, the weight of the metal, and also the enamel work.

Q. It has been testified by one of the defendants' witnesses that the medicine cabinets are the same as the cabinets in the Savoy-Plaza. A. No. 1406

Q. Have you examined the medicine cabinets in the Savoy-Plaza? A. I did.

Q. How did the medicine cabinets in the Essex House compare? A. It compares only as to size of the medicine chest in the Savoy-Plaza, but not as to the quality. As to the mirror, the quality of the mirror, the weight of the door and the enameling.

Q. Is there any place in the medicine cabinets in the Essex House for a toothbrush? A. No.

Q. Unless it is laid down on the shelf? A. On the shelf. 1407

Q. Have you examined the lighting fixtures in the Essex House? A. Yes, sir.

Q. Above the first floor? A. Yes.

Q. Can you state whether or not they are what you consider suitable and appropriate for a hotel of this character? A. I do not consider them appropriate for this type of hotel.

Q. Will you tell us why? A. I have installed fixtures in the hotels I have mentioned, and they

1408 are way, way superior, as to design and as to quality of the metal.

Q. What would you consider a reasonable amount to spend for fixtures in a first-class apartment hotel of 1,187 rooms? A. Taking into account my own experience in other hotels I would say between sixty and seventy-five thousand dollars, for this type of house, having in mind the hotels I built.

The Court: But the specifications did not tell the builder to make any such expense, but he must do it within the allowance of—fifty thousand dollars?

1409 Mr. Judd: I think the witness's testimony would indicate that $50,000 was a very moderate allowance.

The Court: I understand.

Q. Mr. Zilber, have you had any experience in the erection or installation of elevators? A. Yes, I have.

Q. And will you tell us whom you would go to for the completion of an elevator job? A. The same contractor that started the initial work.

Q. Will you tell us why? A. Can't get anybody else to fix the elevators, as I have had the

1410 experience.

Q. You cannot get anybody else? A. No.

By the Court.

Q. Why is that? A. Other companies would not like to interfere with the company that has the contract on that particular job.

Q. Why not? Is there some particular agreement among the companies to that effect? A. I don't know, your Honor, but that is the fact.

Q. Couldn't you get an independent electrical 1411
contractor to go in and complete it? A. Most of those independents are non-union.

Q. They are non-union? A. Non-union, yes.

Q. Aren't there any independent union electrical contractors? A. There were not in the years 1927, 1928, 1929 and 1930. Besides that, I would never dare to take in an outsider. That removes the obligations of my own company in case there is something wrong with the elevator.

Q. Are there guarantees in this elevator installation contract, so to speak? A. Yes, for a certain period of years.

1412

By Mr. Judd.

Q. Have you examined the plans for the Essex House in relation to a sanitary cove? A. Yes, sir.

Q. Can you tell me in what rooms or in what spaces a sanitary cove is included in the item of "sanitary cove" in Schedule B? A. In all the spaces of the basement, in all the public corridors, servants' entrances, elevator lobbies.

Q. In the guest rooms? A. No.

Q. Do the plans or specifications call for carpeting the full width of those spaces? A. I have not seen that.

Q. Can you show us on the plans any way in 1413
which a carpet might be installed so that the edge would lie flat (handing witness blue prints)? A. Yes, sir. The top of the base if five-eighths of an inch above the cement floor, the level of the cement floor. That gives enough room for the carpet to lay down on the floor and be on the same level as the edge of the base.

Q. Will you tell us whether there is any advantage in having a sanitary cove? A. Oh, yes, in

1414 the maintenance, and in cleaning the corridors it is a very great advantage.

Cross examination by Mr. Murray.

Q. In case where the elevator contract has been let, Mr. Zilber, I understand, then, that you are at the mercy of the elevator contractor for the life of the building where the elevators have gone in? A. No.

Q. Well, you can not get anyone else to do any repair work, can you? A. During construction.

Q. Can you get anyone else to do repair work after construction? A. After, yes; after all the
1415 mechanics are out.

Q. But during construction you say you cannot get anyone to repair them? A. No.

Q. Will you name some of the elevator companies which were in existence in 1930? A. Yes. A. B. See; Gurney, and the Otis Elevator Company.

Q. Now, Gurney, as matter of fact, is not a manufacturer of elevators, is he? A. They do manufacture now, yes.

Q. But at that time they did not, did they? A. Yes, they did.

Q. But a great part of their business was the
1416 installation of cars manufactured by other companies, was it not? A. No.

Q. Was that ever the fact with respect to the Gurney people? A. From 1924, I believe, then they started to make their own motors.

Q. Well, they always made their own motors, did they not? A. Well, I don't know just how they conducted their business.

Q. Didn't they manufacture their own motors at a time when they were not manufacturing cars?

A. I can not tell you. I have had only one or two experiences with the Gurney Elevator, and I didn't care whether they made them themselves or bought them from somebody. They installed the elevators. 1417

Q. So, as matter of fact, you did not know whether the cars were Gurney's own cars or someone else's manufacture? A. They are known as "Gurney Elevator cars".

Q. How many years' experience have you had? A. Twelve and a half.

Q. Don't you know as matter of fact that the Gurney Company were accustomed to buy cars from other manufacturers, and to place their own name thereon? A. No. 1418

Q. You don't know that? A. No.

Q. Well, would you say that was not the fact? A. I don't know.

Q. Do I understand you to say that the fixtures —electric fixtures costing $50,000 would not have been appropriate in this apartment hotel? A. I don't think so, after my own experience. They were of inferior quality.

Q. How much experience have you had in buying electric fixtures? A. Oh, for five hotels.

Q. What hotels? A. The Oxford, the Bradford, the Olcott, the Beekman and the Park Royal. 1419

Q. From whom have you purchased electric fixtures? A. For the Park Royal, the Beekman and the Olcott from The Lightolier Company.

Q. Is the Lightolier Company a good company for electric fixtures? A. Yes.

Q. And when you purchased from The Lightolier Company in these specific instances, did you buy standard equipment? A. Well, they have shown us designs and all kinds of samples, and we

1420 selected the samples we thought were appropriate for the building.

Q. Well, were they standard or not? A. I don't think so.

Q. Were they manufactured specially? A. No.

Q. Well, what do you understand a "standard" fixture to be? A. A simple design.

Q. Then, a design which is not simple is not a standard fixture, is that right? A. I should say so.

Q. So that if they had something more than simple designs already manufactured in stock, you would not call that a standard fixture? A. Well,

1421 they make drawings for each type of fixture.

Q. When? A. When they approach a client.

Q. Did they in any of the three instances that you have mentioned do that—in the three instances in which you purchased from them? A. Well, we have seen similar fixtures in the showrooms.

Q. Did they draw designs in the three instances which you have mentioned buying electric fixtures from them? A. Yes.

Q. Then, they were not standard designs? A. They were standard, with the exception that a

1422 few items we wanted a different finish on—maybe another leaf or a little longer or wider to fit a certain space.

Q. The Lightolier Company manufactures quite a lot of fixtures in numerous designs, do they not? A. Yes, sir.

Q. And if you want something more added, you are going to pay more money, are you not? A. Of course.

Q. And is it not very often the fact that although you pay more money than the standard

fixtures would cost, you are not getting a bit better fixtures than if you had taken the standard? A. Not with a reputable firm. 1423

Q. Well, you are getting another leaf probably or whatever it is that is added— A. (Interposing.) Yes. It costs a certain proportion more.

Q. And is it not a fact that sometime you can overdress a hotel by spending too much money on fixtures?

The Court: Having too many leaves?

Mr. Murray: Yes.

Q. Is not that a fact? A. I don't know about hotels. 1424

Q. You do not? A. I know a few.

Q. Do you know the Waldorf-Astoria? A. I have heard of it.

Q. Have you ever been in there and seen their fixtures? A. No.

Q. Well, what hotels have you been inside of? A. The hotels that I have named, and hotels in the same category—residential hotels.

Q. Do you claim that the Savoy-Plaza is in the category with the Hotel Essex? A. I should say it is.

Q. You would say that the Hotel Essex is as good as the Savoy-Plaza? A. By the name—in which way? 1425

Q. In the type of hotel? A. Well, the Savoy-Plaza, I think, is considered higher than the Essex. I don't know—to a certain extent.

Q. Well, don't you know? A. I am not acquainted with the transient hotels very much.

Q. You are not acquainted with what hotels? A. Not with transient hotels.

1426 Q. With a class of hotels, you say? A. No; I say "with transient hotels".

Q. Oh, transient hotels? A. Yes.

Q. Is the Savoy-Plaza entirely a transient hotel? A. No, I would not say so.

Q. How much of it is transient? A. I don't know.

Q. What do you know about the Savoy-Plaza? A. It is on 59th Street and Fifth Avenue.

Q. Is that all you know? A. About.

Q. Now, do you know the incomplete items of work which were left undone in the Essex Hotel in the middle of December, 1930? A. I don't know.

1427 Q. Did you ever see a list of items, Exhibit No. 84—Plaintiff's Exhibit No. 84? That is Exhibit No. 85 that you have there? A. Yes, this is No. 85 that I have—Schedule B.

Q. Yes. Now, in the ordinary course of construction of a new building, Mr. Zilber, one trade has to wait upon another trade, has it not? A. Yes, sir.

Q. The steel is finished, and something else is started? A. Yes.

Q. And after that, something else is started? A. Yes.

1428 Q. And then something else still is started later, after that? A. Yes.

Q. Did you see the Essex Hotel in December, 1930? A. No.

Q. When did you see it? A. The first time I saw it was in August of 1931.

Q. And what was its condition then? A. I have seen a private job on the second floor, and I have seen a lot of working people working throughout the building in all kinds of trades.

Q. Now, take a 40-story building, such as the 1429
Essex House, and I now show you Plaintiff's Exhibit No. 84 (handing witness), and ask you to look at the items of work to be done there, and then say whether there would be any conflict between the different workmen there, or whether each particular trade could not have done its work at the same time with all the other trades? A. (After examining paper.) Well, let us say, window calking: When the windows have been calked, it means that the painter can not work there.

Q. He can not work there? A. In that particu-
lar room where the calker is working. The painter 1430
would not go in there unless all the mechanics are out—everybody concerned with that room had finished their work. I see here electric missing parts. I don't know what parts were missing.

Q. Neither ro I. A. What?

Q. I say, neither do I? A. And I see here Cranell, Nugent & Kranzer—I think they are furnishing material.

Q. Maybe we can make this a little quicker, Mr. Zilber. Will you go over that and then tell me in what respects one contractor's work could not be performed at the same time as another contrac-
tor's work? You have already mentioned that the 1431
calking could not have been on the windows at the same time that the painters were working in the room.

The Court: Well, of course, that would not mean that if calking was being done on the 14th floor, painting could not go on on the 32nd floor, for example?

The Witness: Yes, sir, it could.

1432 Mr. Murray: Yes.

The Witness: I see here another item, glass to be placed in mirrors, and glass. That means that the painter could not work on the trim.

Q. That is, at the very moment that the glass is being put in, you mean? A. Yes. All those items will interfere with some trades.

Q. What items? A. Like hardware missing; the painter would not be able to make a complete job of the room.

Q. But he could work in another room, though, 1433 if there were forty floors, could he not? A. Yes, but that costs much more if a painter has to go from one room to another—say, from the twelfth floor to the thirtieth floor—to do work, and then come back to the 12th floor. That disturbs the organization. I see, again, lighting fixtures missing, to the extent of $600—and that would be the same condition. The painters would not be able to work in those particular rooms.

Q. Yes? A. And I see plaster patching. The carpenter may not be able to finish his work, and the painter would not be able to go ahead with his work.

1434 Q. How much was the patching? A. The patching was about $436 for labor, and $55 for materials.

The Court: Mr. Zilber, in a hotel of forty stories, where there are, let us say, a dozen or more trades involved or required to complete the building, could not a general contractor or someone in charge arrange and dispose the various trades so that one section of the building could be carried on without being impeded by the other trades?

The Witness: Yes, but that would probably mean instead of doing the job in six months, it would probably take a year. 1435

The Court: I am glad I did not go into that business.

The Witness: There are a lot of items that will interfere with each other. A contractor would not be able to go ahead with his work.

Q. Let me ask you this: Could not every one of these trades have worked together at some time or other in that building? A. Yes, they could, but with a certain loss of time. 1436

The Court: I do not see how you figure out a loss of time. On the contrary, I should think that would save time.

The Witness: Your Honor, suppose there are thirty rooms on a floor in a hotel, and I send in—and everything is ready for me, and I send in men on one floor, twenty men, and they will do the work probably in a day and a half; but if I have to send in only a gang of ten men, and to disturb them, and say "You go to room 321", and "You go to room 325", and send another man to room 370, and so on, and I have got to watch at the same time that the men are working in different rooms throughout that entire area of the building— 1437

The Court: But you have forty floors, and you do not have to put your men on different floors, because you could put them all in one part of the building, or you could put them on ten consecutive floors—

The Witness: If I have to make a difference in the price—

1438 The Court: No; I am not talking about the cost. It might cost more, but you have said that instead of taking six months, it would probably take a year, and I do not see that at all.

The Witness: Well, that is the experience we have had in the construction line.

Q. Were you connected with Bing & Bing in 1931? A. What did you say?

Q. I say, were you connected with Bing & Bing in 1931? A. No, I was never connected with them.

Q. Were you connected with The Prudence
1439 Company? A. No.

Q. How did you come to go to this job in August, 1931? A. There was a dentist on the second floor—a dentist, a tenant on the second floor, who wanted to alter his office, and I got the job at that time through a friend of that dentist. I was a general contractor at that time. It was a private job.

Q. Have you at any time been all through that building? A. Before August, 1931?

Q. At any time. A. Not previous.

Q. Have you been there afterward? A. Yes.

Q. All through that building? A. Yes.

1440 Q. For the purpose of testifying here? A. To acquaint myself with the items I worked on—Schedule B.

Q. Have you ever done any work for Bing & Bing? A. No.

Mr. Murray: That is all, your Honor.

Mr. Schenck: That is all.

(Witness excused.)

ARTHUR S. LUKACH, recalled in rebuttal. 1441

Direct examination by Mr. Judd.

Q. Mr. Lukach, did you try to get anyone else to complete the work on the elevators in this building in the spring of 1931? A. I did.

Q. Did you succeed? A. I did not.

Q. I show you an agreement purporting to have been made on the 22nd day of April, 1931, between the 58-59 Realty Corporation and Otis Elevator Company, and ask you if that is the contract under which the Otis Elevator people completed the work (handing witness)? A. It is.

Q. And did you negotiate with them in order 1442
to obtain the lowest price? A. I did.

Q. Possible for that work? A. I did.

Mr. Judd: I now offer that contract in evidence.

Mr. Murray: May I see it, please?

Mr. Judd: Yes (handing paper to Mr. Murray).

(Marked Plaintiff's Exhibit No. 109.)

Q. Mr. Lukach, will you tell us what condition you found the refrigerating machine in when you entered the Essex House? A. When we were 1443
ready to start the refrigerating machine we found that the compressor evidently was not tight; that is, the piston was not tight to the walls of the compressor, and we had to take it down, and I observed myself that the entire interior of the cylinder was scored—

Mr. Murray (Interposing): Was what?

The Witness: Was scored, so that it was impossible to obtain proper compression.

1444 Q. And the amount which was spent to repair it was, in your opinion, a reasonable charge? A. It was.

Q. For that service? A. It was.

Q. Is there any or does the absence of radiators in interior bathrooms have any effect upon the value or the desirability of a hotel for residence purposes? A. Yes, it has a very definite effect.

Q. Well, will you tell us what that effect is? A. In practically all cases the interior bathrooms are adjoining bed rooms. During the cold months of the year, when the bedroom windows are open in the night time, an interior bathroom, even
1445 though the door is shut—because there is always a space between the door and the saddle or sill, and these interior bathrooms in the morning, when you get up, are almost as cold as the room itself. Tenants, I know, objected strenuously to this, and it was necessary to purchase a number of electric heaters to satisfy them. In other words, the average tenant who takes a suite in a hotel of the class of the Essex House demands a warm bathroom in the morning on a cold winter's day, so that he can dress and wash and shave and everything else in comfort.

1446 The Court: This is off the record.
(Informal discussion, off the record.)

Q. Will you tell us whether electric heaters, such as you have referred to, furnish a satisfactory substitute for radiators? A. They do not, for this reason—

Q. Why not? A. For this reason: in the first place you want your bathroom warm as soon as you get up in the morning, when you go in to it. An electric heater means that you either have to

plug in to the switch and wait, or, as I know a lot 1447
of tenants have done in some cases—because the hotel has to pay for this current—they leave the thing turned on all night—which means, of course, a tremendous outlay in current—since each one of these electric heaters consumes roughly as much current as ten 50-watt lamps would consume. A second thing is that it is a make-shift arrangement. The heater is just put on the floor, with a wire running from the heater up to a wall receptacle, and you are liable to stumble over it, and it is very unsightly. It is a make-shift at best.

Q. I show you now Plaintiff's Exhibit No. 85, the list of omissions and substitutions (handing 1448
witness). Will you tell me whether the omission of substitution of metal for wood stools and aprons has any effect upon the value or the desirability of an apartment hotel? A. Yes.

Q. What effect? A. The combination metal stools and aprons that were used in the Essex House are the type used in loft buildings. A wood stool and apron gives a much more finished appearance, and is the type that should be found in a residential dwelling.

Mr. Murray: I object to the answer and move to strike out "should be found". 1449

The Court: Motion denied.

Mr. Murray: Exception.

Q. I now call your attention to the item of closets in servants' rooms, and ask you whether the omission of closets in servants' rooms affects in any way the value or the desirability of a hotel? A. It definitely affects the value of the hotel.

Q. In what way? A. Because the management has to go out and buy portable wardrobes or

1450 closets to make up for the ones shown on the plans.

Q. There is an item to which I now call your attention of plastering, furring and lathing, some $2,392, representing the difference in cost between plaster and Keene Cement. Can you tell me whether there is any advantage in the use of Keene Cement? A. Yes, there is an advantage.

Q. And what is that? A. Keene Cement gives a very hard surface; it stands up under knocks and blows that the walls in the service section of a hotel would get every day. Ordinary plaster chips, and that means that the maintenance is
1451 much higher, because you have to patch and paint in those places.

Q. Have you examined the mirrors in the Essex House in the bed room doors? A. I have.

Q. There is an item in Schedule B representing the difference in cost between bevelled and straight mirrors. Will you tell us whether bevelling would impose in any way the mirrors of a hotel, in general? A. A bevelled mirror is always considered a much finer mirror than one without a bevel.

Q. In your opinion would these mirrors, if they had been bevelled, have been appropriate for the
1452 hotel and sufficient for a person to see himself? A. They would have.

Q. There is an item in Schedule A for calking windows. Will you tell us what the state of the windows was when you entered the building? A. There were spaced between the windows and the brick work, which had to be filled up in order to prevent the seepage of water; and these were filled with oakum and then a plastic cement. Also where two of the windows came together, in cases

of rooms where there were double windows, you could look through and see daylight through the space; and it was necessary to put moulding over all these junctions between two windows. 1453

Q. And is that in spite of this special weather-stripping about which testimony was given here? A. Yes, that was in spite of that special weather-stripping.

Q. Now, Mr. Murray has stated that he did not know what electric parts were missing, as shown on the list in Schedule A, which is Plaintiff's Exhibit No. 84. Can you tell us in detail what those parts were? A. Yes; switch-plates, switches, base-receptacles, base-plates, push-button at entrance doors; buzzers. In general, that is what they were. 1454

Q. In the letting of the painting contract, Mr. Lukach, can you tell us approximately how many estimates you obtained? A. Yes; I took eight estimates.

Q. And how did Mr. Landsman's estimate compare with the others? A. Mr. Landsman was the lowest.

Mr. Judd: That is all.

Cross examination by Mr. Murray.

1455

Q. You do not mean to say that Landsman's estimate was lower than Gladstone's, do you? A. After negotiations were completed, Landsman's estimate was lower than Gladstone's.

Q. Have you a copy of Mr. Gladstone's bid? A. I think it is here somewhere.

Mr. Murray: I call your Honor's attention in this Otis Elevator contract to labor and materials to be furnished by contractor, for

1456 furnishing all labor and material required to complete the original contract, covering all elevator signal systems, door-operating devices, and light equipment, without specifying just what the work was to be done.

The Court: Is it your contention that there was more work done than was called for by the original contract?

Mr. Murray: No. My contention is that—

The Court: Or that they have not proved that only that which was called for by the original contract was done?

Mr. Murray: That was all that was per-
1457 formed; but that the cost of performing that part of the work left undone was very much less than $14,500; and that what in reality was being done under that $14,500 contract was to pay the Otis Elevator Company for past due indebtedness which was owing by Central Park Properties; and that, therefore, $14,500 is not the fair value or the fair cost of doing what had to be done in order to put the elevators into operation. I think on Mr. Lukach's direct examination you will remember that there was something said that they had to pay Otis in order to get them to do
1458 the work, and something which was actually the cost of doing the work, and that he could not allocate that.

Q. When did you see the compressor first? A. Some time in the middle or latter part of the summer of 1931. I saw it immediately when I went into the building, and then made a closer examination and started running it.

Q. When did you first find out it needed some repair? A. At the time I have just stated.

Q. That is, in the middle of the summer of 1459
1931? A. Yes.

Q. And what do you mean when you say that the compressor was scored? A. I mean that there were grooves approximately one-eighth of an inch deep in the wall of the cylinder of the compressor.

Q. And what would ordinarily cause those grooves? A. Roughness or something abrasive or grit; something wearing on the wall.

Q. What effect did the grooves have upon the operation of the compressor? A. It could not function, because it would not compress the gas. It would just leak through those grooves.

Q. Would it operate at all? A. It would oper- 1460
ate, but not satisfactorily.

Q. You knew at that time who had put this in, did you not? A. Yes.

Q. Did you communicate with them? A. As I recall, I think they did—I think I did, yes.

Q. But you did not give them the job? A. I did not give them job, no.

Q. Did you know whether there was a guaranty made by them? A. I did not.

The Court: Did you get a bid from the original contractor?

The Witness: At the present time I am 1461
not sure. I think I did, and that their price was higher.

Q. Don't you know as matter of fact, Mr. Lukach, that no communication was ever had with the original installer of this equipment, and that if communication had been had with them, that they would have been glad to correct any fault that there was in this equipment, under their guaranty? A. I can not say as to that.

1462 Q. Will you show me on the exhibits in evidence where provision is made for interior radiators? A. Have you the heating plans, Mr. Judd?

Mr. Murray: What exhibit is that?

Mr. Judd: It is not an exhibit. I do not think it has been marked in evidence. It may have been.

Mr. Murray: Show me the original plans—Plaintiff's Exhibit No. 4, I think it was.

(Papers handed to Mr. Murray by Mr. Judd.)

Mr. Murray: No. It was Plaintiff's Exhibit No. 5.

1463

Q. Please point out to me where provision is made for radiators in interior bathrooms, on those plans (handing witness)? A. No radiators are shown on the architectural plans at all; always on the heating, mechanical plans. They are not on these plans.

Q. So there is no provision for radiators in those particular plans? A. There is no provision for any radiators in these plans (handing papers to Mr. Murray).

Mr. Murray: Now, please give me Plaintiff's Exhibit No. 4.

1464

The Court: Would the radiators be shown on those other specifications of the heating?

The Witness: They would be shown on the heating plans—the interior radiators. They would not be mentioned specifically, I don't think, in the specifications.

Mr. Murray: Of course, your Honor—well, I suppose that Mr. Braislin—am I correct in thinking that Mr. Braislin came back on the stand, and then remembered very distinctly

that those were among the specifications which he had approved? 1465

The Court: They were introduced or identified, but he testified that they were submitted at the same time.

Mr. Murray: Yes.

Q. Will you look at those specifications, now, Mr. Lukach, and point out where this provision for interior radiators is (handing witness)? A. I saw the interior radiators shown on the heating plan. The definite location of any radiators is not given in the heating specification.

Q. Then, there is no mention of interior radiators in that specification; is that correct? A. 1466
No, there is none. It simply refers to all radiators shown on plans.

Q. All right. I now show you from the original specifications No. 24, Article 13, and ask you to read what Article 13 says (handing witness). A. "Contractor shall submit additional price for furnishing and installing at all window openings in this contract interior metal window sills with radiator supports for phantom radiators."

Q. Now, will you find for me where it is specifically provided, in the face of that, that wooden sills shall be provided (handing witness)? A. 1467
Under the carpentry and mill work specification, Article 39, "Window Trim", it says, "This contractor shall furnish and install all window moldings, stools, and aprons for all metal windows, as shown or called on drawings and schedule sheet of white wood molded as shown or required."

Q. Now, do you claim that under this provision for the installing of metal windows at an additional cost, that there was a breach of the specifications when they did install wood sills? A. I don't understand. You said "metal windows"—

1468 Q. (Interposing.) Metal window sills—the article that you originally read. A. At additional cost?

Q. Yes. A. Additional to what cost? What do you mean? The wood sills would cost more. I don't understand. In addition to what?

Q. I don't know.

The Court: Well, the witness can not answer your question unless you put a question that you yourself understand.

Q. Well, there is a provision in here, is there not, Mr. Lukach, for the providing of metal win-
1469 dow sills? A. There is not a provision. It merely asks for an alternate figure to be submitted in the estimate or bid.

Q. All right. Metal window sills were provided, were they not? A. They were.

Q. What is the width of the mirrors in the bedroom doors? A. I can not give that to you exactly in inches.

Q. Well, how much does the bevel take off the width of a mirror? A. Half an inch on either side.

Q. That is, an inch altogether? A. An inch altogether.

1470 Q. Sometimes is it not very material to consider the width of the door in order to determine whether you are going to get a mirror as large as possible for the ladies who are going to use them? A. The doors in Essex House were of the average width; and, after all, you do not stand up within two or three inches of a mirror. You usually get back some distance into the room, and you can usually see yourself.

The Court: You were not providing for ladies of abnormal width?

The Witness: If I had been providing for them, it would have been different. 1471

Mr. Murray: That is all.

Redirect examination by Mr. Judd.

Q. At the time you entered into this contract with the Otis Elevator Company, did the representative of the Otis Elevator Company inform you that part of the cost was not for completing the contract, but was for the payment of sums due from Central Park Properties? A. He simply said that was the amount that would have to be paid to complete the contract according to the original plans and specifications. 1472

Mr. Judd: That is all.

(Witness excused.)

Mr. Schenck: The plaintiff rests. Now, if your Honor please, I wish to make a motion, suggested earlier in the trial, to conform the pleadings to the proof in respect of Exhibits A and B.

(The Court granted the motion.)

Mr. Schenck: I have prepared a little memorandum on the evidence, which is quite general in character and refers to several authorities that I think have some bearing upon the weight of evidence. 1473

Might I now submit, in connection with the plaintiff's motion for the direction of a verdict, a summary of amounts and the interest items, and suggest, for the purpose of clarity, that if entirely convenient to your Honor, the verdict, if in favor of the plaintiff, might be in the specific component amounts as divided between Schedules A and B, and certain other

1474 items that have been referred to in the evidence. I merely suggest this as a method of determination. We have here Schedule A with a certain interest date from which we calculate interest. There are certain items of taxes from the date of the payment of which we are claiming interest; and in respect to other items they are quite confusing, so far as amounts are concerned,—that is, to have an interest item from each and every date, as the bond specifically provides; and we have, therefore, suggested that our interest date in respect of those amounts be figured from the
1475 last date of payment—approximately the 1st of October, 1931.

Then, our Schedule A items would have a different interest date, and that, therefore, in order to avoid any possible confusion, we suggest that the component parts of the verdict be separately stated,—if that is entirely convenient to your Honor?

The Court: Yes, that would be the better way, I think.

Mr. Schenck: Yes.

The Court: I think you ought to consider this question: as to whether, assuming that a
1476 verdict be directed for the plaintiff, the sum could be in excess of the deficiency judgment?

Mr. Judd: I do not believe our total comes to more than that, except for the addition of interest subsequent to—

The Court (Interposing): You are asking here for $830,000-odd—

Mr. Judd (Interposing): But that includes $75,000 of interest. $119,000 of it is interest.

The Court: It is not important, just for the moment, to determine upon any figure, but I

just want you to consider the principle in- 1477
volved. It seems to me that that Westcott case indicates pretty clearly that the limit of your recovery would be the deficiency judgment; and if you are going to urge a contrary view, then I would like to have authorities. If, on the other hand, you agree to that view of the case, then it is not necessary to give further consideration to it.

Mr. Schenck: As I stated at the beginning of the case, although we had two theories indicated in our complaint, we had considerable doubt with regard to the second of the two theories; and that we were not going to ask 1478
any judgment that involved any element of doubt; and we were, therefore, going to restrict the amount that we were asking under our first cause of action to an amount that would not exceed the amount under the second cause of action; and I think I can state now —although I should be glad to consider it further—that we shall not ask any amount in excess of the amount of the deficiency judgment. This matter of interest may enter into it somewhat, but I shall be prepared tomorrow, at any rate, to be specific and definite in
that respect; and if we do ask for anything in 1479
excess of the deficiency judgment, it will only be on the basis of authorities that clearly justify it.

Mr. Murray: If your Honor please, I suppose it would be in order for me at this time to renew the motion to dismiss the complaint, on the ground that no cause of action has been stated, and upon the further ground that no damages have been proven upon the part of the plaintiff.

Motion to Direct Verdict

1480 The Court: I will deny the motion.

Mr. Murray: Exception.

Mr. Schenck: If your Honor please, yesterday I handed up a little specification of our claims, but I neglected to make in terms a motion for a direction of a verdict. I now upon the pleadings and proof herein, and upon the stipulation herein dated the 7th of May, 1934, and upon all papers and proceedings had herein, move that this Court direct a verdict in favor of the plaintiff, for the sum of $830,086.69.

The Court: I will reserve decision on that
1481 motion.

Mr. Schenck: Of course, in making a motion for a specific amount I am giving the extent of our claim. Our claim is unliquidated in regard to Schedule A and in regard to Schedule B, and I make the motion deeming that the proofs establish a damage in that amount. I also have considered, as stated at the very opening, a reduction of our claim, and your Honor will recollect that a number of items have been eliminated from Schedules A and B so that the full amount of our claim is now under the amount of the deficiency judg-
1482 ment, the interest on the deficiency judgment also making the sum total of deficiency judgment plus interest in excess of the sum total of all the items of our damage, plus interest.

Both sides summed up and the Court took the case under consideration.

In the course of the closing argument Mr. Murray conceded that the certificate of occupancy (Exh. 39) was not a certificate of completion.

Stipulation and Order Settling Bill of Exceptions.

1483

IT IS HEREBY STIPULATED AND AGREED, that the foregoing bill of exceptions, together with the exhibits therein mentioned, which are to be annexed hereto and deemed a part hereof, contain all of the evidence taken on the trial of the action and all proceedings in connection therewith which are material to said exceptions and that the same may be settled and ordered on file as the bill of exceptions herein with the same force and effect as if each exception were signed separately, and ordered *nunc pro tunc* as of June 14, 1934, the date of the entry of judgment in the action.

1484

Dated November 13, 1934.

ALFRED T. DAVISON,
Attorney for Plaintiff.

THOMAS E. WHITE,
Attorney for Defendant.

Upon reading the foregoing stipulation, it is ordered that the foregoing Bill of Exceptions, together with the exhibits therein mentioned, which are to be annexed hereto and deemed a part hereof, contain all of the evidence taken on the trial of the action and all proceedings in connecition therewith which are material to said Exceptions; and the same is hereby settled and signed with the same force and effect as if each Exception was signed separately, and ordered *nunc pro tunc* as of June 14, 1934, the date of the entry of judgment in the action.

1485

Dated November 13, 1934.

CLARENCE G. GALSTON,
United States District Judge.

Request for Direction of Verdict.

1486

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[L-52-110]

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

1487

Upon the pleadings and proof herein, and upon the stipulation herein dated May 7, 1934, and upon all papers and proceedings had herein, the undersigned hereby requests this Court to direct a verdict in favor of plaintiff for the sum of $830,086.69, made up as follows:

1. The amount shown in Exhibit 84 (payments in completion) together with interest on:	$210,999.73
(a) the sum of $38,080 (first half of taxes) from May 28, 1931 to May 15, 1934	6,773.02
(b) the sum of $19,040 (second half of taxes) from November 28, 1931 to May 15, 1934	2,810.61
(c) the sum of $153,879.73 from October 1, 1931 to May 15, 1934	24,182.30
Total of subdivision 1	$244,765.66

2.	The amount shown in Exhibit 85 (omissions and substitutions)	$185,842.28	1489
	together with interest thereon from December 16, 1930 to May 15, 1934	38,034.03	
	Total of subdivision 2	$223,876.31	
3.	The amount of interest lost by plaintiff, as alleged in paragraph XXXVII (3) of the complaint (interest on $6,575,000 from December 16, 1930 to October 1, 1931	$312,357.53	1490
	together with interest thereon from October 1, 1931 to May 15, 1934	49,087.19	
	Total of subdivision 3	$361,444.72	

The undersigned further requests that the verdict directed pursuant to this request shall state separately the amounts awarded in respect of subdivision 1, 2 and 3 above; and that the judgment to be entered upon such verdict shall include interest on the total amount of the verdict from May 15, 1931, to the date of entry of such judgment, regardless of the actual date of rendition of the verdict. 1491

Dated, New York, N. Y., May 14, 1934.

Respectfully submitted,

ALFRED T. DAVISON,
Attorney for Plaintiff,
Office and P. O. Address:
2396 Third Avenue,
Borough of Manhattan,
City of New York.

Opinion of Judge Galston, Dated June 6, 1934, After Trial of Action.

1492

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

(L-52-110)

THE PRUDENCE COMPANY, INC.,

Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,

1493

Defendants.

June 6, 1934.

ALFRED T. DAVISON, Esquire, Attorney for Plaintiff (Martin A. Schenck, Orrin G. Judd, Ralph C. Williams, Jr., Esqs., of Counsel)

THOMAS E. WHITE, Esquire, Attorney for Defendants, (Joseph F. Murray, Esquire, of Counsel)

1494

GALSTON, D. J.

By stipulation this cause was tried by a jury of one.

On September 24th, 1929, the plaintiff and the Central Park Properties, Inc. entered into a building loan agreement, by the provisions of which The Prudence Company agreed to lend the sum of $6,650,000. This loan was to be secured by a bond and mortgage as a first lien upon premises on the south side of West 59th Street in the City of New York.

The borrower agreed to erect, according to the plans and specifications submitted and approved in writing by The Prudence Company, a modern forty story and basement fireproof hotel containing 1269 rooms and 687 bathrooms, together with the usual equipment installed in buildings of that type, but not including hotel furniture and furnishings. This building will hereafter be referred to as "The Essex House." 1495

It was agreed that the building was to be completed and ready for occupancy by December 16th, 1930.

The building loan agreement contained the following clause: 1496

> "The Borrower shall furnish to the Lender a surety bond in the amount of $3,000,000., in a company satisfactory to Lender, to be in form and contents satisfactory to Lender, conditioned upon and guaranteeing completion of said building within the time hereinafter specified in strict accordance with said plans and specifications and this agreement and free from claims of liens."

In pursuance of the foregoing provision of the building loan agreement, the borrower procured for the plaintiff the bond of the defendants herein in the amount of $3,000,000, conditioned upon and guaranteeing the completion of the building described in the building loan agreement not later than the 16th day of December, 1930, in strict accordance with the plans and specifications of the building loan agreement and free from claims of liens. 1497

The surety bond contained, among others, the following provisions:

1498 "and said building loan agreement and all and singular the terms thereof are hereby made a part of this bond by reference thereto with the same force and effect as if set forth in full in the body hereof."

"No changes from said plans and specifications above referred to, including any changes in the design or cubic contents of or the materials or equipment in said building or in the performance of the work of construction of said building, and no delay, neglect or failure of the Obligee to proceed promptly or otherwise to enforce the completion of said build-
1499 ing by the Principal or enforce any remedy it may have against the Principal, and no act done or omission of or action or proceeding taken by the Obligee in case of any default by the Principal, shall in any respect release or relieve the Principal or Surety from their obligations hereunder (which shall also include all such changes.)"

At or about the time of the execution of the building loan, advance payments totaling $3,250,000 were made to the borrower. From then on various other advances were made, bringing the
1500 total to $6,650,000, of which the sum of $75,000 was deposited by the Central Park Properties, Inc. with The Prudence Company for the purpose of meeting various expenditures in connection with the completion of the building; and the said sum of $75,000 was thereafter applied by the plaintiff on account of the said principal sum of $6,650,000.

The plaintiff's cause of action arises out of the failure of the borrower to complete the building

and have it ready for occupancy as a modern hotel on or before December 16th, 1930. 1501

On December 23rd, 1930, the Central Park Properties, Inc. abandoned the completion of the building leaving it in an unfinished state. The plaintiff also alleges that the Central Park Properties, Inc. did not construct and complete the building in accordance with the plans and specifications of the building loan contract; and the defendants, it is alleged, have not made good the defaults on the part of the Central Park Properties, Inc. In consequence, the plaintiff employed contractors to complete the building in general accordance with the plans and specifications of the building loan 1502 agreement, and it was made ready for occupancy on or about the 1st day of October, 1931.

The plaintiff alleges that it has expended certain sums for labor and materials in completing the building; and that also by reason of the omissions of labor and material called for by the building loan agreement and the plans and specifications and because of substitutions made by the Central Park Properties, Inc. of inferior materials, plaintiff was additionally damaged in that it was compelled to pay taxes, and suffered loss of interest, making total damages of $830,086.69, 1503 which sum includes interest to May 15th, 1934.

The defendants interposed a general denial and also set up ten separate defenses, of which, however, the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th and 9th were stricken out on plaintiff's motion before trial. Prudence Company v. Fidelity and Deposit Company of Maryland, et al., 2 Fed. Supp. 454.

The 6th defense alleges that on the 5th day of December, 1930, the plaintiff and the Central Park Properties, Inc. agreed that all the work required

1504 for the completion of the building provided for in the building loan agreement had been done except work which could be completed for the sum of $75,000 and that by the deposit of that sum the liability of the defendants on their bond was released and discharged.

The 10th defense is that the omissions of items and the substitution of materials, of which the plaintiff complains, were made with the knowledge and approval of the plaintiff; and that accordingly the plaintiff waived strict performance of the terms and provisions of the building loan agreement, and the plaintiff is estopped thereby 1505 from alleging that these omissions and substitutions were contrary to the plans and specifications and to the said building loan agreement.

At the opening of the case the defendants' counsel asserted a defense of fraud. This defense was not proved.

Exhibit 84 sets forth a list of payments made by The Prudence Company in completing the building. The reasonableness of some of these items is challenged. It includes a painting expenditure of $72,882. It is claimed that this is an excessive amount; and that at the time of final payment by 1506 The Prudence Company, the painting was separated from the other items, and it was estimated that $25,000 would cover the cost of completion of the painting. Defendants also emphasize the fact that the plaintiff's inspectors reported that $14,000 would be sufficient to complete the painting. As against that, however, we have the testimony that what was done was in strict compliance with the provisions of the building loan agreement and the plans and specifications, with the exception that there was included a removal of molding

and repainting necessitated by such removal. 1507
However, the net figure of $71,650 is arrived at after having made suitable deduction for such labor and material as were not called for by the plans and specifications. It nowhere appears that either Schermerhorn or Billsborrow, plaintiff's inspectors, submitted detailed estimates in respect to the job, at the time that it was estimated that but $14,000 would be required to complete the painting. It is argued that this and other items were reckless expenditures because the total amount so expended was so vastly in excess of early estimates.

It is unreasonable to believe that The Prudence 1508
Company deliberately went out of its way to complete the building at a cost in excess of that actually demanded by the condition of the building when it was abandoned by the Central Park Properties, Inc. The best evidence of the cost is what The Prudence Company was compelled to pay; and in the absence of proof that the same work could have been done at a substantially lower figure, and particularly in the absence of any proof that the work was not justified by the plans and specifications and the building loan agreement, and since the plaintiff has sustained its bur- 1509
den of proof, the figure as to the painting must be accepted. This same principle must be followed in respect to all the other items entering into the schedule of completion. The third paragraph of the bond is important in this regard:

> "THIRD: Should the Obligee give the Surety written notice of any default of the Principal as aforesaid, and (1) should the Surety for twenty days after receipt of such notice fail to diligently proceed with or pro-

1510 cure others to diligently proceed with the construction and completion of said building and the supplying and installation of said equipment therein, * * * the Obligee * * * may construct and complete such building in general accordance with said building loan agreement and plans and specifications as the same may be changed from time to time, and/or may employ a contractor, subcontractors, architects, superintendent, * * * and the Principal and Surety jointly and severally agree to repay to the Obligee on demand any and all sums of money paid by the
1511 Obligee for the purposes authorized by this paragraph, with interest at the rate of six per centum per annum from the time or times of any such payment or payments made by the Obligee."

The defendants contend that the plaintiff is not entitled to reimbursement for electric current, insurance, steam consumption, taxes and telephone set forth in Schedule A (plaintiff's Exhibit 84), because they were not payments made in completing the building.

As to the telephone charge amounting to
1512 $204.62, there is force in the suggestion because there is no proof that this service was necessary to complete the building. This is not true of the item of electric current, for obviously current was necessary for light in which to work and for operation of the elevators. For similar reasons the amount paid for steam consumption was necessary to complete the building. Steam was necessary to enable the workmen to work with some degree of comfort, and for preservation of the building.

Expenditures for insurance and taxes are 1513
chargeable against the surety, as was indicated in Trainor Co. v. Aetna Casualty Co., 290 U. S. 47, in which it was said:

> "In the meantime, the uncompleted buildings necessarily lay unrented, subject to expense in the way of taxes, insurance, accumulating interest, etc., deteriorating in quality and steadily declining in value. Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking; 1514
> and this can be done here only by giving it the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see Kidd v. McCormick, supra, p. 398—but exceeding neither the amount due on its debt nor the amount of the bond."

Moreover, paragraph Ninth of the building loan agreement provides:

> "The lender may apply any part of any advance in payment of interest or taxes due 1515
> and the amounts so applied shall be deemed advanced to the borrower."

It is thus obvious that the building loan agreement specifically contemplated the payment of taxes pending completion. These obligations become the obligations of the surety, for the surety bond provides that if the surety exercises the right to complete, then the obligee shall place at his disposal any unadvanced amounts of money

1516 which would have been received by the principal "with the same requirements * * * as to payment of interest, taxes, insurance, premiums and otherwise, as if such obligations were in fact made by the Principal * * *"; and all monies required to cure any default, which of course includes a default as to interest, taxes or insurance, shall be furnished by the principal or surety. The bond states:

> "The provisions of this paragraph 'Second' shall not in any event relieve the Surety from performance of any of its obligations
1517 under this bond, and all monies required to cure any default shall be provided by the Principal and/or Surety."

Paragraph Fourth of the bond also imposes this same obligation upon the surety company in respect to taxes, for it provides:

> "In the event that there are at any time any liens * * * or claims of record * * * against the premises * * * the Surety agrees at its own expense to remove the same * * * and in default thereof, the Obligee may cause such removal * * * by pay-
1518 ment * * * and the Surety shall repay to the Obligee any monies expended by the Obligee in payment."

In Kidd v. McCormick, 83 N. Y. 391, cited in Trainor Co. v. Aetna Casualty Co., supra, it is said:

> "The work needed to complete was one of time; and while the time was running, interest was running also, taxes were levied, insurance was to be kept up, and the premises

were yielding no rent. It is plain that to repay him just what he expended to finish the buildings would not make him whole; for he had to pay, besides the cost of the building, interest to Granniss, and lose interest on his own mortgages, and pay taxes and premiums." 1519

Defendants also oppose any recovery for interest. This item is in the sum of $312,357.53, being the amount of interest of which it was deprived from December 16, 1930 to October 1st, 1931, the date of completion. This sum represents the interest on $6,575,000 for that period. The effective dates, it will be recalled, designate respectively the date on which the hotel, according to the building loan agreement and surety bond, was to have been completed, and the latter date, the date of actual completion. 1520

The defendants' contention would seem adequately to be disposed of under the authorities cited, Kidd v. McCormick, 83 N. Y. 391, and Trainor Co. v. Aetna Casualty Co., 290 U. S. 47.

The payment to the Otis Elevator Company of $14,500 for finishing the work according to the original contract, and of $395 for removing and reinstalling the pit equipment to permit the waterproofing of the elevator pits, are challenged as being unreasonable. However, had this work been done by some other contractor, the probability is that the practical value of the guaranty clause in the contract between the Central Park Properties, Inc. and the Otis Elevator Company would have been impaired. The elevators were incomplete on December 16th, 1930. There was owing from the Central Park Properties, Inc. on the Otis Elevator Company contract and to that company a 1521

1522 sum in excess of $80,000, and a conditional bill of sale had been filed by the Otis Elevator Company. Notice of this was given to the sureties, the defendants herein, on January 13th, 1931. Nothing was done by the defendants to meet the situation, and the full amount was owing to the Otis Company on April 15th, 1931. Bing and Bing, as contractors for The Prudence Company, endeavored to get other contractors to complete the work on the elevators, but for ample reason, employed the Otis Elevator Company to complete the installation.

Objection is made to the item of $608, for level-
1523 ing cement floors. This was certainly a proper item because the cement specifications required that the floors "be worked to a level and true surface."

Waterproofing of the elevator pits is objected to, but one of the reports shows that after the waterproofing, water had seeped through.

The window caulking was necessary because it was found that the windows leaked.

Item No. 10, for replacing mirrors and glass, is objected to. The objection in part is sustainable because $345.26 was paid for replacing bro-
1524 ken lights. This item is disallowed.

Likewise item 20, a claim for $295, for repair work to kitchen equipment, is disallowed, as it was for repair work without sufficient explanation as to its having been originally defective.

On the other hand, the item of $1232 for rekalsomining 154 ceilings is justified.

As to repairing the compressor in the refrigerating system, the testimony shows that that was necessary because of original defects.

The charge of $700 for insulating ceiling of steam and incinerator rooms is not justified, and the item is disallowed. 1525

There remains for consideration Exhibit 85, which is an itemization of labor and materials omitted by the Central Park Properties, Inc. and not supplied by The Prudence Company, Inc.; and also substitutions by the Central Park Properties, Inc. of materials inferior to those called for by the plans and specifications.

In Paragraph Third of the bond is found this provision:

> "If at any time the Obligee shall take over the work of constructing and completing said building, supplying or installing such equipment, it is understood and agreed that the Obligee does not thereby assume any obligation to complete the said building, and the right of the Obligee to repayment from time to time for moneys expended hereunder, with interest, shall not in any case be affected by any failure on its part to complete the said building, nor shall the Surety be thereby released from its obligation to complete and equip said building." 1526

In Board of Education v. Maryland Casualty Company, 27 Fed. (2d) 20, the action was against the surety on a building contract to recover for the contractor's default. As in the case at bar, a bond was given to assure performance of a contract, or else to respond in damages. The court said: 1527

> "As the contractor failed to perform, its surety may be called upon at once to pay the damages without waiting for the completion

of the building by the owner or another party. Indeed the building may never be completed, for, unless otherwise provided by the contract, the owner is not required to complete the work abandoned by the contractor as a condition precedent to recovery on a bond of assurance, Wills v. Peace Creek Drainage District, 4 F. (2) 519; National Surety Co. v. City of Huntsville, 192 Ala. 82, 68 So. 373; Newton v. Consolidated Constr. Co., 184 Mich. 63, 150 N. W. 348; King v. Nichols, 53 Minn. 453, 55 N. W. 604; Simons v. Wittmann, 113 Mo. App. 357, 88 S. W. 791; Cinn. Ry. v. Carthage, 36 Ohio St. 631, yet the surety will be liable for damages occasioned by the breach."

The defendants' position is that there has been no proof offered by the plaintiff that the value of the building has been decreased by the omissions and substitutions set forth in Exhibit 85.

The principle is stated in Jacob & Youngs v. Kent, 230 N. Y. 239:

> "The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value."

The reasonableness of this principle as applied to the facts of this case is obvious. The arrangement between the Central Park Properties, Inc. and The Prudence Company contemplated the advancing of sums aggregating $6,650,000 for the

erection of a building according to the plans and specifications forming part of the building loan contract; and if this were not enough, we find in the contract, which measures the rights of the parties to this litigation, a guaranty that the erection will be in strict conformity with those plans and specifications. Any departure therefrom must, therefore, be at the risk of the obligors, unless indeed they obtained a waiver or a consent in writing, as provided by the contract. There is no proof that either was obtained. Any substantial variance, therefore, and I mean by that, any variance other than a mere inconsequential departure from the plans and specifications, must be charged against the obligors. The schedule in question, therefore, presents in the main valid items of damage. 1531 1532

Merely because advances were made by the plaintiff to the Central Park Properties, Inc. after plaintiff's inspectors and even its vice-president presumably were aware of the substitutions, neither limits the plaintiff's rights nor enlarges the defendants'. The building loan agreement provides:

> "The making of any advance or any part of an advance shall not be deemed an approval or acceptance by the Lender or the holder of the mortgage of the work theretofore done." 1533

The defendants argue that article 15 of the general conditions included in the contract made permissible changes in the plans and specifications without the written consent of the plaintiff. But, clearly, those provisions concern the owner, con-

1534 tractor and architect. It would be against all reason to assume that a lender would permit a borrower to make changes in plans and specifications without affecting the amounts to be advanced, and, of course, would be in entire contradiction of the effect of the clause in the bond that the building be erected in strict accordance with the plans and specifications. Such an interpretation as defendants insist on would vitiate the surety bond.

Other provisions also of the building loan agreement, knowledge of which, of course, is chargeable to and binding upon the surety companies, make
1535 clear that article 15 is not intended to relieve the Central Park Properties, Inc. from the strict performance with the plans and specifications. For example, in article 8th therein, the lender is given discretion to withhold advances "if the borrower does not erect said building strictly in accordance with plans and specifications, approved in writing by the lender."

In article 17th is the provision that "the Borrower agrees to erect * * * according to the plans and specifications prepared by Frank Grad, architect * * * heretofore submitted to the Lender, and
1536 amendments thereto made by the Lender in a memorandum dated September 24th, 1929, and initialed by the Lender and Borrower."

Now as to specific items mentioned in Exhibit 85, to which defendants point criticism:

Lighting fixtures: Plaintiff claims $26,900, as the difference between the amount actually spent by the Central Park Properties, Inc. for lighting fixtures and the amount which the specifications

called for as lighting fixture expense. Section 4 of the specifications reads as follows: 1537

> "Cash allowances. The general contractor shall include in his estimate the following cash allowances for the features enumerated:
> Lighting fixtures, installed, connected, and including connection fees, $50,000."

The defendants' broad interpretation that a discretion was vested in the owner to install equipment at a lesser cost would have considerable force were it not that a standard of comparison had been set up by the parties themselves.

In the loan acceptance, defendants' Exhibit A, it is stated that: 1538

> "Said building and the materials and workmanship therein contained, shall be in all respects a first-class apartment hotel."

A. E. Lefcourt, writing on February 5th, 1930 to The Prudence Company, said:

> "I believe that the Savoy-Plaza, where I have been living for the past three years, is a fair example of what is being done and built in up-to-date apartment hotels."

The proof in the case is that the electric fixtures were not equal to those of the Savoy-Plaza. It follows that if fixtures such as were suitable for a first-class hotel or one that conformed with the standards of the Savoy-Plaza Hotel could have been purchased for less than $50,000, the plaintiff would have had no cause of complaint and would have suffered no damage; since, however, fixtures 1539

1540 of an inferior grade were supplied, the item under objection must be allowed..

The item in respect to medicine cabinets follows the same analysis. They were not up to the standard specified, inasmuch as they were inferior in quality as to the mirrors, weight of metal and enamel work. That item too must be allowed.

Neither the plans nor the specifications nor anything in the building loan agreement specifies the installation of interior bathroom radiators; and the item appearing in Exhibit 85, "Radiators omitted in 568 interior bathrooms, $25,000" will not be allowed.

1541 Finally, as to the defense of compromise, it is contended that the withholding of $75,000 on December 5th, 1930 for the purpose of completing the building was in effect a compromise between the parties. This is urged as a defense of accord and satisfaction. It may be noted that the defense is not pleaded. On the contrary, paragraph Fourth of the defendants' answer treats the item quite differently, in alleging that the Central Park Properties, Inc. deposited that sum with the plaintiff, which was "thereafter appropriated by plaintiff for payment on account of said $6,650,000."

1542 Nor does the proof show that by the deposit of $75,000 from the final payment of $300,000 made by the plaintiff on December 5th, 1930, it was by way of accord and satisfaction.

The applicability of Smith v. Alker, 102 N. Y. 87, Wyckoff v. Meyers, 44 N. Y. 143, Hart v. City of New York, 201 N. Y. 45, and Bell v. Fox, 138 App. Div. 569, is not seen.

The case at issue is not one between owner and builder; and there was no undertaking by The Prudence Company that with the amount deposited there was a release of all or any claims. Indeed, the proof would indicate that the amount so deposited was the result of general estimates on the subject of completion. There is no certification by the architect or anybody else in the case at bar that the building was completed. The parties attempted to facilitate the work of completion by effecting the deposit. It is very likely true that The Prudence Company could have withheld the entire $300,000, which it made as a final advance on December 5th, 1930, but to have done so might have precipitated the filing of liens by materialmen and sub-contractors, who, the evidence discloses, were at the time unpaid. Because it seemed to The Prudence Company the wiser policy to endeavor to stave off disaster is no reason for concluding that by accepting a deposit of $75,000 for completion work it was waiving any claim whatsoever. There was no payment by the Central Park Properties, Inc. or any consideration given for an accord and satisfaction. Hudson v. Yonkers Fruit Co., 258 N. Y. 168. 1543 1544

In accordance with the foregoing opinion, a verdict in favor of the plaintiff is directed for the sum of $798,416.81, as follows, with interest from May 15th, 1931 to the date of the entry of judgment on the verdict: 1545

1.	The amount shown in Exhibit 84 (Payment in completion) less		
	telephone item of	$204.62	
	broken glass	345.26	
	repair work to kitchen equipment	295.00	
	insulating ceilings	700.00	$209.454.85

1546	together with interest on:—	
	(a) the sum of $38,080 (first half of taxes) from May 28, 1931 to May 15, 1934	6,773.02
	(b) the sum of $19,080 (second half of taxes) from November 28, 1931 to May 15, 1934	2,810.61
	(c) the sum of $153,879.73 from October 1, 1931 to May 15, 1934	24,182.30
	Total of subdivision 1	$243,220.78
	2. The amount shown in Exhibit 85 (omissions and substitutions) less the item of $25,000 for radia-	
1547	tors for interior bathrooms	160,842.28
	together with interest thereon from December 16, 1930 to May 15, 1934	32,909.03
	Total of subdivision 2	$193,751.31
	3. The amount of interest lost by plaintiff, as alleged in paragraph XXXVII (3) of the complaint (interest on $6,575,000 from December 16, 1930 to October 1, 1931	$312,357.53
	together with interest thereon from October 1, 1931 to May 15,	
1548	1934	49,087.19
	Total of subdivision 3	$361,444.72

CLARENCE G. GALSTON,
U. S. D. J.

Notice of Motion to Strike Out Defenses from Answer.

1549

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,

Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,

Defendants.

1550

PLEASE TAKE NOTICE that on the affidavit of Frank Fox, sworn to May 17, 1932, and on the original Building and Loan Agreement, executed and delivered on September 24, 1929, to be produced by plaintiff upon the argument of this motion, a copy of which is annexed to the annexed affidavit of Frank Fox, sworn to May 17, 1932, and on the original bond, executed and delivered by defendants as sureties on September 25, 1929, a copy of which is annexed to the annexed affidavit of Frank Fox, sworn to May 17, 1932, and on the affidavit of Clemens F. Schmitz, sworn to May 17, 1551
1932, and on the complaint herein, verified February 18, 1932, and on the answer of the defendants herein, verified April 29, 1932, the plaintiff will move this Court at a Term thereof for the hearing of motions to be held at Room 235, United States Post Office Building, Borough of Manhattan, City, County and State of New York, on

1552 the 24th day of May, 1932, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order striking out as sham and frivolous each and every denial contained in subdivisions marked "First", "Second", "Third" and "Fifth" of the answer of the defendants herein, and also for an order striking out the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Tenth Separate and Distinct Defenses contained in the answer of the defendants herein, on the ground that each such defense is insufficient in law, and also for an order granting to the plain-
1553 tiff such other and further relief as may be just and proper in the premises.

Dated, New York, May 17th, 1932.

Yours &c.

ALFRED T. DAVISON,
Attorney for Plaintiff,
Office and Post Office Address,
2396 Third Avenue,
Borough of Manhattan,
City of New York.

To:

1554 THOMAS E. WHITE, Esq.,
Attorney for Defendants,
55 Liberty Street,
New York, N. Y.

Affidavit of Frank Fox, Annexed to Foregoing Notice of Motion.

1555

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,

Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,

Defendants.

1556

STATE OF NEW YORK,
CITY OF NEW YORK } ss.:
COUNTY OF KINGS,

FRANK FOX, being duly sworn, deposes and says: I am a Vice President of The Prudence Company, Inc., the plaintiff in the above entitled action.

Annexed hereto and marked "Exhibit A"* is a correct and true copy of the Building Loan Agreement executed and delivered by the plaintiff and Central Park Properties, Inc., and referred to in subdivision marked "III" of the complaint herein.

1557

Annexed hereto and marked "Exhibit B"** is a correct and true copy of the surety bond executed

* The Building Loan Agreement which is Exhibit A here referred to is printed as Plaintiff's Exhibit 1 on page 567 of this record.

** The Surety Bond which is Exhibit B here referred to is printed as Plaintiff's Exhibit 2 on page 591 of this record.

Affidavit of Frank Fox, Annexed to Foregoing Notice of Motion

1558 and delivered by the defendants on or about September 25, 1929, and referred to in subdivisions marked "IX", "X", "XI", "XII", "XIII", "XIV", "XV" and "XVI" of the complaint herein.

FRANK FOX

Subscribed and sworn to before me this 17th day of May, 1932.

BELLE R. NELKIN
Notary Public, Kings County.

1559

Affidavit of Clemens F. Schmitz, Annexed to Foregoing Notice of Motion.

[SAME TITLE]

STATE OF NEW YORK,
CITY OF NEW YORK, } ss.:
COUNTY OF KINGS,

1560 CLEMENS F. SCHMITZ, being duly sworn, deposes and says: I am President of Remsen Brokerage

Affidavit of Clemens F. Schmitz, Annexed to Foregoing Notice of Motion

1558a

Company, Inc., and am the person who arranged for the giving of the bond by the defendants above named to The Prudence Company, Inc., which bond was dated September 25, 1929, and is the bond referred to in subdivisions marked "IX", "X", "XI", "XII", "XIII", "XIV", "XV" and "XVI" of the complaint herein.

I personally know that I gave and delivered to the defendants a copy of the Building Loan Agreement dated September 24, 1929, between the Central Park Properties, Inc. and The Prudence Company, Inc., which Building Loan Agreement is referred to in subdivision marked "III" of the 1559a complaint herein, a copy of which said Building Loan Agreement is annexed to the annexed affidavit of Frank Fox, sworn to May 17, 1932, and I left with the defendants a copy of said Building Loan Agreement, before delivery of said bond to plaintiff.

CLEMENS F. SCHMITZ.

Subscribed and sworn to before me this 17th day of May, 1932.

BELLE R. NELKIN,
Notary Public, Kings County.

1560a

Stipulation *Re* Exhibits Annexed to Notice of Motion.

1558b

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,

Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,

Defendants.

1559b

IT IS HEREBY STIPULATED, CONSENTED AND AGREED that Exhibit A annexed to the plaintiff's notice of motion herein dated May 17, 1932, is a correct and true copy of the Building Loan Agreement made September 24, 1929, between Central Park Properties, Inc. (therein referred to as "Borrower") and The Prudence Company, Inc. (therein referred to as "Lender"), and referred to in the complaint herein as "the Building Loan Agreement", and that Exhibit B annexed to plaintiff's notice of motion herein, dated May 17, 1932,

1560b is a correct and true copy of the Surety Bond

1561

dated September 25, 1929, executed by Central Park Properties, Inc. (therein sometimes called the "Principal") as Principal, and Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore (therein sometimes called the "Surety") as Sureties, and is the Surety Bond referred to in the complaint herein as "The Surety Bond".

IT IS FURTHER STIPULATED, CONSENTED AND AGREED that said Building Loan Agreement (Exhibit A) and said Surety Bond (Exhibit B) may, on the presentation, argument and consideration by the 1562
Court of the motion brought on by plaintiff's notice of motion dated May 17, 1932 herein, be submitted and considered by the Court to the same extent and effect as though the same were duly offered and admitted in evidence on a trial herein, and to the same extent and effect as if the same had been set forth in the pleadings herein and for all purposes of said motion said copies shall be deemed to be the originals.

Dated, May 26, 1932.

ALFRED T. DAVISON,
Attorney for Plaintiff. 1563

THOS. E. WHITE,
Attorney for Defendants.

Stipulation Amending Notice of Motion.

1564

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

1565

IT IS HEREBY STIPULATED, CONSENTED AND AGREED that the notice of motion herein, dated May 17, 1932, returnable May 24, 1932, wherein and whereby plaintiff has moved for an order striking out the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Tenth Separate and Distinct Defenses contained in the answer of the defendants herein, on the ground that each such defense is insufficient in law, be and the same hereby is amended so as to include in such notice of motion notice of motion for an order striking out the Fourth De-
1566 fense contained in the answer of the defendants herein on the ground that such Fourth Defense is insufficient in law, so that and to the end that said notice of motion dated May 17, 1932, shall read as follows:

> "and also for an order striking out the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Separate and Dis-

Stipulation Amending Notice of Motion

tinct Defenses contained in the answer of the defendants herein, on the ground that each such defense is insufficient in law." 1567

Dated, New York, June 20, 1932.

ALFRED T. DAVISON,
Attorney for Plaintiff.

THOS. E. WHITE,
Attorney for Defendants.

Opinion of Judge Bondy, Dated January 18, 1933, on Motion to Strike Out Defenses from Answer. 1568

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.
(L 52-110)

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

1569

ALFRED T. DAVISON, Esq. and ORRIN G. JUDD, Esq., for Plaintiff.

THOMAS E. WHITE, Esq. and JOSEPH F. MURRAY, Esq., for Defendants.

BONDY, District Judge:—

This is a motion to strike from the answer certain denials as sham and frivolous and nine defenses as insufficient in law.

1570 The action is upon a surety bond made by the defendants guaranteeing the completion of a building by the Central Park Properties, Inc., in accordance with the terms of a building loan agreement between it and the Prudence Company, Inc.; the obligee named in the bond.

For a first cause of action the complaint alleges that the plaintiff and Central Park Properties, Inc. executed a building loan agreement by which the plaintiff agreed to lend to Central Park Properties, Inc. $6,650,000. to be secured by a first mortgage on certain real estate and the building to be erected thereon; that the defendants exe-
1571 cuted and delivered to the plaintiff the bond in suit in the sum of $3,000,000. pursuant to the provisions of the building loan agreement, which was incorporated in the bond by reference, conditioned upon the completion of the building on or before December 16, 1930, in accordance with the terms of the building loan agreement. It alleges that the plaintiff advanced the full amount of the loan but that Central Park Properties, Inc. failed to complete the building on December 16, 1930, and abandoned the completion of the building on December 23, 1930; that the plaintiff in accordance
1572 with the provisions of the building loan agreement completed the building with damage to the plaintiff, including the loss of interest, cost of completion and taxes, amounting to $788,676.94.

For a second cause of action the complaint alleges the same facts and in addition thereto recites that in proceedings brought by the plaintiff to foreclose its mortgage, the premises were sold for less than the amount of the mortgage and expenses of foreclosure and that a deficiency judgment was rendered therein for $716,215.02; that

had the building been completed in accordance with the terms of the building loan agreement the value of the premises would have been so much in excess of $6,650,000. that the plaintiff upon the foreclosure of the mortgage would have realized the full amount of the principal and interest due it, over and above the expenses of foreclosure; that the deficiency judgment and other items of damage set forth amount to $950,706.68 for which sum and interest plaintiff demands judgment. 1573

It has been stipulated that the agreement and surety bond may "be submitted and considered by the court to the same extent and effect as though the same were duly offered and admitted in evidence on a trial herein, and to the same extent and effect as if the same had been set forth in the pleadings herein * * *." The provisions of the instruments so incorporated in the pleadings accordingly will control wherever inconsistent with any allegations contained therein. 1574

Since the denials against which the motion was directed simply raise questions as to the actual terms of the building loan agreement this stipulation and a further express agreement by the parties make it unnecessary to consider them.

The second defense is the most comprehensive and presents questions which are involved in several of the other defenses. It therefore is considered first. 1575

It is alleged that the building loan agreement provided that the plaintiff would make a first advance of $3,250,000. at the time of closing, that the remaining $3,250,000. ($3,400,000?) should be paid in instalments on the basis of 75% of the labor and materials installed in the building, and that the other 25% would be paid to Central Park

1576 Properties, Inc. as a final advance; that the building loan agreement further provided that no advance would be due and payable unless all work usually done at the stage of construction when the advance was applied for had been done in a good and workmanlike manner and all materials and fixtures usually installed at such stage of construction had been installed; that on December 5, 1930 the plaintiff had in its possession as and for the final advance only $300,000. instead of $812,500. and that on said date the plaintiff made the final advance of $300,000. to Central Park Properties, Inc. although to the knowledge of the
1577 plaintiff all work usually done at such stage had not been done in a good and workmanlike manner and all the materials and fixtures usually installed at such stage had not been installed.

The provisions of the agreement upon which the defendants rely are contained in paragraphs "Ninth" and "Nineteenth" thereof. Paragraph "Ninth" provides in part: "No advance shall be due unless all work usually done at the stage of construction when the advance is applied for be done in a good and workmanlike manner, and all materials and fixtures usually furnished and in-
1578 stalled at such stage of construction be furnished and installed. * * *"

Paragraph "Nineteenth", after reciting the first advance of $3,250,000., provides in part: "All subsequent advances shall be made by the Lender to the Borrower on the basis of seventy-five per cent. of the value of the labor and materials installed and incorporated in the construction of the building * * * as determined by the appraisers of the Lender."

The plaintiff contends that these provisions 1579
did not limit its discretion in making advances in view of the provisions of paragraph "Third", "Said loan is to be advanced in such amounts and at such times as Lender approves", and of paragraph "Ninth", "Advances may be made as and when the Lender or holder of the mortgage believes it advisable so to do, and all such advances or payments shall be deemed to have been made in pursuance of this agreement and not in modification thereof."

Defendants contend that these provisions cannot be reconciled and that the conflict should be resolved in their favor because the provision for 1580
the payments on a basis of seventy-five per cent. of the value of the work and material installed is typewritten and the others are printed, and because the plaintiff drew the agreement.

The defendants fail to take into account that they are compensated sureties, and insurers within the rule that ambiguities in insurance contracts must be construed in favor of the insured. See Pickens County v. National Surety Co., 13 Fed. (2d) 758, 762; Van Buren v. American Surety Co., 137 Iowa 490; Brandrup v. Empire State Surety Co., 111 Minn. 376.

1581

There is not any irreconcilable conflict between terms providing when an advance shall become due and payable and when the lender accordingly must make an advance, and terms providing that the lender may at his discretion make an advance although not otherwise due and payable. The fact that the provision for payment on a seventy-five per cent. basis is typewritten therefore does not

1582 nullify the provisions giving the lender discretion in making advances.

The provision making advances depends upon the stage of construction and the provision permitting advances to be made when the lender deems it advisable so to do are contained in the same paragraph. This in itself is convincing evidence that the parties considered them consistent. The fact that the former provision begins "No advance *shall be due*" and the latter "Advances *may be made*" establishes the nature of the reconciliation and clearly indicates a distinction between the plaintiff's obligation to make advances when due
1583 and payable under the express terms of the agreement and its privilege to do so prior thereto.

Defendant's contention that plaintiff was under an obligation to retain a certain percentage of the loan until final completion moreover is inconsistent with the provision of paragraph "Third" of the building loan agreement which states: "Interest on the full principal amount shall run from the date herein fixed for completion * * * unless the full amount shall be previously advanced. * * *" This indicates that the parties contemplated the possible advance of the full
1584 amount before completion.

Even assuming, however, that the provision that advances are to be made "on the basis of seventy-five per cent. of the value of labor and materials installed" limited plaintiff's discretion in making advances, the defense is insufficient in the absence of an allegation that advances were made beyond seventy-five per cent. of the value of labor and materials installed in the building.

An allegation that twenty-five per cent. of the amount of the loan was not retained is insufficient. The limitation of advances to seventy-five per cent. of the amount of the labor and materials is not the same as a limitation to seventy-five per cent. of the amount of the loan. British-American Tobacco Co., Ltd. v. U. S. Fidelity & Guaranty Co., 177 A. D. 582. 1585

Moreover, no defense is stated in the absence of an allegation that the defendants were actually prejudiced by premature advances. Globe Indemnity Co. v. Southern Pacific Co., 30 Fed. (2) 580; Pickens County v. National Surety Co., 13 Fed. (2) 758; Village of Canton v. Globe Indemnity Co., 201 A. D. 820; Colon & Co. v. Commercial Casualty Insurance Co., 226 A. D. 525, 528, affirmed 252 N. Y. 565. 1586

A surety is released only to the extent of its damage, and if this is less than the amount sued for, the defense must be designated as a partial defense. Houston v. Coombs, 224 A. D. 396; New York Civil Practice Act, Sec. 262.

The first defense alleges that the agreement provided that the building should be completed and ready for occupancy not later than December 16, 1930; that on December 5, 1930 the building was in a state of construction where it would have required a sum in excess of $170,000. to complete and make ready for occupancy, and that there were omissions of labor and materials from and substitutions of inferior materials in the building amounting in value to a sum in excess of $230,000.; that on the same day the plaintiff, with knowledge of these facts, made a full and final 1587

1588 payment of $300,000. to Central Park Properties, Inc. and thereby released and discharged the defendants from liability under the bond. It does not allege facts showing that on December 5, 1930 the building could in no event have been completed in accordance with the terms of the contract, and that the plaintiff, knowing that the principal on the bond must default, nevertheless made the final advance of $300,000. A defense alleging such facts would import a payment made in bad faith and might be valid. See Patterson v. Meyerhofer, 204 N. Y. 96, 100. The defense actually alleged however is insufficient.

1589 The third defense alleges that the agreement provided that the building should be completed and ready for occupancy not later than December 16, 1930; that on December 5, 1930 the plaintiff owed to the defendants the duty of reserving enough of the money then in its possession to assure the completion of the building; that on December 5, 1930 plaintiff paid Central Park Properties, Inc. $300,000., said sum being sufficient to complete the building and make it ready for occupancy. The chief reason for the insufficiency of this defense is the absence of any provision in the agreement imposing any duty of the kind al-
1590 leged, as has been pointed out. Moreover, the defense shows no violation even of the duty alleged, there being no allegation that the sum advanced was a final one, nor that the building could not be completed and made ready for occupancy by December 16, 1930.

The fourth defense alleges that the bond provided that plaintiff would deliver to defendants

written notice of any default of the principal within thirty days after two executive officers should have actual notice thereof; that on or about December 16, 1930 two executive officers of plaintiff had actual notice of the default but failed to give defendants notice as provided for by the bond. 1591

No damage or prejudice is alleged. Violation of conditions requiring notice of default to be given to compensated sureties does not discharge the surety unless it is damaged thereby, and even then only to the extent that it has been damaged, unless the provision requiring such notice is made a condition precedent to the surety's liability. Southern Surety Co. v. Mac Millan Co., 55 Fed. (2) 641; New Amsterdam Casualty Co. v. United States Shipping Board, 16 Fed. (2) 847; Barhydt v. Ellis, 45 N. Y. 107. 1592

The construction resulting in a condition is not favored. In any case, when the provision is expressly designated a covenant this construction will be adopted. National Surety Co. v. Long, 125 Fed. 887. The provision relied on by defendants is one of a group in the bond, all introduced by the words prominently printed in capital letters: "And the Principal and Surety Jointly and Severally Covenant and Agree with the Obligee as Follows." Use of the word "covenant" derives added significance from the fact that the bond by express language clearly indicates the distinction between the covenants and conditions therein. 1593

This defense is designated a complete one. Even if the defendants were damaged, the defense should be designated a partial one, unless the damage equalled the amount sued for.

1594 The fifth defense alleges that the bond provided that the plaintiff would retain from the total amount agreed to be advanced sufficient money with which the building might be completed in the event of the default of Central Park Properties, Inc., and the plaintiff agreed that in the event of any such default it would place at the disposal of the defendants such unadvanced amounts of money as would have been receivable by Central Park Properties, Inc., if the latter had not committed any default; that on December 16, 1930 when the default occurred there was no money in plaintiff's hands which was applicable to the com-
1595 pletion of said building.

Plaintiff's discretion was not thus limited, as has already been pointed out. The provision of the bond referred to gives defendants power, within twenty days after receipt of notice of the principal's default "to diligently proceed with or procure others to proceed with the construction and completion of said building. * * * And the Principal and Obligee agree that in the event the Surety exercises such right, then the Obligee shall * * * place at the disposal of the Surety for its use in the exercise of such right, unadvanced
1596 amounts of money which would have been receivable by the Principal from the Obligee under said building loan * * *" This is an agreement to place at defendants' disposal sums which have not been advanced, and not a promise as alleged that there will, at any given time, be unadvanced sums in plaintiff's possession. This is made even clearer in the sentence immediately following the one quoted from: "The amounts of money which

may be payable by the Obligee to the Surety in any contingency pursuant to the provisions of this paragraph are expressly limited to the amounts not theretofore advanced or applied by the Obligee under said building loan. * * *" 1597

The seventh defense alleges that the building loan agreement provided that the final advance would not be due and payable until Central Park Properties, Inc. had obtained and delivered to the plaintiff a certificate of completion issued by the Building Department of the City of New York but that the final advance was made without such certificate having been obtained and delivered to the plaintiff. 1598

The provision relied on appears in paragraph "Ninth" of the agreement and is as follows: "No advance shall be due unless all work usually done at the stage of construction when the advance is applied for be done in a good and workmanlike manner, and all material and fixtures usually furnished and installed at such stage of construction be furnished and installed, the final advance shall not be due and payable until the Borrower shall obtain and deliver to the Lender the usual certificate of completion issued by the Building Department. * * *"

Immediately following this we find "Advances may be made as and when the Lender or holder of the mortgage believes it advisable so to do, and all such advances or payments shall be deemed to have been made in pursuance of this agreement and not in modification thereof." 1599

As heretofore stated, the agreement provides for the time when and the conditions upon which

1600 advances should become due and payable and additionally gives the plaintiff the privilege to make advances though not due and payable under the agreement. The provision relied on does not limit the Lender's discretion in making advances.

The eighth defense alleges that the building loan agreement provided that all advances by plaintiff to Central Park Properties, Inc. would be made after application by the latter, which application should set forth the work incorporated to the date of the application, together with the cost of each item, but that this was not done.

This provision likewise is contained in the
1601 "Ninth" paragraph which gives the plaintiff the privilege to make advances though not otherwise due and payable.

The ninth defense, designated a partial one, alleges that on December 5, 1930, plaintiff and Central Park Properties, Inc. agreed that all the work required to complete the building could be done for $75,000.; that plaintiff made a final advance of $300,000. to Central Park Properties, Inc. and the latter deposited with the plaintiff $75,000.; that plaintiff should have applied this $75,000. to the completion of the building, but instead applied it
1602 on account of the principal or interest which became due on the mortgage.

In paragraph "Ninth" of the building loan agreement it is provided that "The Lender may apply any part of any advance in payment of interest or taxes due, and the amount so applied shall be deemed advanced to the Borrower."

The principal owed only one debt to the plaintiff. The defense alleges the application of the

money to this debt. No question of application of payments is involved. 1603

Even assuming the correctness of defendants' construction, the defense, not being confined to either of the causes of action, must be stricken out on motion, because in no case could it constitute a defense to the second cause of action. Price v. Derbyshire, 128 A. D. 472; Meyer v. Central Railroad of New Jersey, 185 A. D. 812; Browning, King & Co. v. Terwilliger, 144 A. D. 516; New York Civil Practice Act Sec 262.

The tenth defense, also designated a partial one, alleges that the omission of items and the substitutions of inferior materials referred to in the 1604 complaint (constituting damage in the sum of $228,722.78) were made with the knowledge and approval of the plaintiff and that plaintiff waived strict performance of the building loan agreement with reference thereto.

Plaintiff concedes that this defense would be sufficient were it not for the fact that "the allegations of the defense are capable of being supported by the knowledge or silent acquiescence on the part of the plaintiff."

The defense alleges plaintiff's knowledge and approval as a conclusion of fact, and accordingly 1605 is sufficient. We are not here concerned with the evidence which would be relevant to support it.

The motion accordingly is granted as to the first, second, third, fourth, fifth, seventh, eighth and ninth defenses, and denied as to the tenth.

January 18, 1933.

WM. BONDY,
U. S. District Judge.

Order, Dated February 17, 1933, Granting Motion to Strike Out Defenses From Answer.

1606.

IN THE UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

1607

The plaintiff having moved by notice of motion dated May 17, 1932 as amended by stipulation signed by the attorneys for the parties hereto, dated June 20, 1932, for an order striking out as sham and frivolous, each and every denial contained in subdivisions marked "First", "Second", "Third" and "Fifth" of the answer of the defendants herein, and also for an order striking out the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth separate and distinct defenses contained in the answer herein, on
1608 the ground that each such defense is insufficient in law;

Now, on the return of and on reading and filing said notice of motion dated May 17, 1932 and said stipulation amending the same, dated June 20, 1932, and on the complaint herein verified February 19, 1932 and the answer of the defendants, verified April 29, 1932, and on reading and filing the stipulation between the parties hereto, dated May 26, 1932, and upon the building loan agreement made September 24, 1929, between Central

Order Granting Motion to Strike Out Defenses from Answer

Park Properties, Inc. and The Prudence Company, Inc., and the surety bond dated September 25, 1929, executed by Central Park Properties, Inc., as principal, and Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore, as sureties, and after hearing Alfred T. Davison, Esq., on behalf of The Prudence Company, Inc., plaintiff, in support of the motion, and Joseph F. Murray, Esq., of counsel for the defendants in opposition thereto; and due deliberation having been had, and an opinion in writing having been rendered and filed dated January 18, 1933, it is 1609 1610

ORDERED that the motion to strike out the denials contained in subdivisions marked "First", "Second", "Third" and "Fifth" of the answer as sham and frivolous is denied upon the ground that it has been rendered a moot question by the above mentioned stipulation dated May 26, 1932; and it is further

ORDERED that the motion to strike out the First, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth separate and distinct defenses contained in the answer of the defendants herein on the ground that each such defense is insufficient in law, be and the same hereby is in all respects granted, and that said defenses be and the same hereby are struck out from the answer of the defendants; and it is further 1611

ORDERED that the Clerk of this Court be and he hereby is directed to make a note upon the margin of the original answer verified April 29, 1932, that such defenses are struck out by this order, and referring to this order; and it is further

Order Granting Motion to Strike Out Defenses from Answer

1612

ORDERED that the motion to strike out the Tenth separate and distinct defense contained in the answer of the defendants herein as insufficient in law, be and the same hereby is denied.

AND it is further ordered that the defendant may serve an amended answer within ten days after service of this order.

Dated, New York, February 17th, 1933.

WILLIAM BONDY,
United States District Judge.

1613

Notice of Motion to Strike Out Defenses from Amended Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

1614 FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

Sir:

PLEASE TAKE NOTICE, that on the complaint herein, verified February 18, 1932, and the amended answer of the defendants herein, verified March 2nd, 1933, and on the stipulation between the

1615

parties hereto, dated May 26, 1932, and upon the Building Loan Agreement, dated September 24, 1929, between Central Park Properties, Inc. and The Prudence Company, Inc., and the Surety Bond, dated September 25, 1929, executed by Central Park Properties, Inc., as principal, and Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore, as sureties, the plaintiff will move this Court at a Term thereof for the hearing of motions to be held at Room 235, United States Post Office Building, Borough of Manhattan, City, County and State of New York, on the 17th day of March, 1616
1933, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order striking out the "First", "Second", "Third", "Fourth", "Fifth" and "Sixth" separate and distinct defenses contained in the answer of the defendants herein on the ground that each such defense is insufficient in law and also for an order granting to the plaintiff such other and further relief as may be just and proper in the premises.

Dated, New York, N. Y., March 10, 1933.

ALFRED T. DAVISON,
Attorney for Plaintiff,
Office and Post Office Address,
2396 Third Avenue,
Borough of Manhattan,
New York City. 1617

To:

THOMAS E. WHITE, Esq.,
Attorney for Defendants,
55 Liberty Street,
Borough of Manhattan,
New York City.

Memorandum of Judge Bondy Endorsed on
1618 **Back of Notice of Motion Dated March 10, 1933, for Order Striking Out Certain Defenses.**

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[L-52-110]

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

1619
FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

To meet insufficiencies in the allegations of the defenses contained in the original answer the defendants allege facts in the amended answer meeting the objections with reference to sufficiency of the first defense and overcoming some but not all of the objections to the other defenses. The
1620 motion as to the fourth defense having been withdrawn, the motion is granted as to the second, third, fifth and sixth defenses and denied as to the first (see opinion reported in 2 F. Supp. 454).

July 21, 1933.

WM. BONDY,
U. S. D. J.

Order, Dated July 28, 1933, Granting in Part and Denying in Part Motion to Strike Out Defenses from Amended Answer. 1621

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants. 1622

The plaintiff having moved, by notice of motion dated March 10, 1933, for an order striking out the First, Second, Third, Fourth, Fifth and Sixth Separate and Distinct Defenses, contained in the amended answer of the defendants herein on the ground that each such defense is insufficient in law;

Now, on the return of and on reading and filing said notice of motion dated March 10, 1933, and on the complaint herein, verified February 19, 1932, and the amended answer of the defendants, verified March 2, 1933; and on reading and filing the stipulation between the parties hereto dated May 26, 1932, and upon the Building Loan Agreement made September 24, 1929 between Central Park Properties, Inc. and The Prudence Company, Inc., and the Surety Bond dated September 25, 1929 executed by Central Park Properties, Inc., as Principal, and Fidelity and Deposit Company of Maryland and American Bonding Company of 1623

Order Granting in Part and Denying in Part Motion to Strike Out Defenses from Amended Answer

1624 Baltimore, as sureties, and upon the order made and entered herein February 17, 1933, and the opinion in writing, on which said last mentioned order was made and entered, said opinion being rendered and filed, and dated January 18, 1933; and after hearing Alfred T. Davison, Esq., on behalf of The Prudence Company, Inc., plaintiff, in support of said motion, and Joseph F. Murray, Esq., of counsel for the defendants, in opposition thereto; and the plaintiff having withdrawn its said motion with respect to the Fourth defense
1625 contained in said amended answer of the defendants; and due deliberation having been had, it is

ORDERED that the motion to strike out the First Separate and Distinct Defense contained in the amended answer of the defendants herein, on the ground that it is insufficient in law, be and the same hereby is denied; and it is further

ORDERED that the motion to strike out the Second, Third, Fifth and Sixth Separate and Distinct Defenses contained in the amended answer of the defendants herein, on the ground that each such
1626 defense is insufficient in law, be and the same hereby is in all respects granted and that said defenses be and the same hereby are struck out from the amended answer of the defendants; and it is further

ORDERED that the Clerk of this Court be and he hereby is directed to make a note upon the margin of the original amended answer verified March 2, 1933 that such defendants are struck out by this order and referring to this order; and it is further

Order Granting in Part and Denying in Part Motion to Strike Out Defenses from Amended Answer 1627

ORDERED that the motion to strike out the Fourth Separate and Distinct Defense contained in the amended answer of the defendants herein as insufficient in law, be and the same hereby is deemed to be withdrawn.

Dated, New York, July 28, 1933.

WILLIAM BONDY,
United States District Judge.

Petition for and Order Allowing Appeal and Supersedeas. 1628

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants. 1629

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore, the above named defendants, feeling themselves aggrieved by a judgment made and entered

herein on June 14, 1934, adjudging that the plaintiff, The Prudence Company, Inc., recover of and from the said defendants the sum of $781,694.56, hereby pray that an appeal be allowed from said judgment to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignments of error filed herewith, and pray for an order allowing them to prosecute said appeal and to bring up for review upon such appeal the order dated February 17, 1933 and entered in the office of the Clerk of this court on February 17, 1933, granting plaintiff's motion to strike out the First, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth separate and distinct defenses contained in the answer of the defendants, and to bring up for review upon such appeal the order dated July 28, 1933, and entered in the office of the Clerk of this court on the 29th day of July, 1933, granting plaintiff's motion to strike out the Second, Third, Fifth and Sixth separate and distinct defenses contained in the amended answer of the defendants, and that a transcript of the record and papers and proceedings in said cause may be duly authenticated and transmitted to the United States Circuit Court of Appeals for the Second Circuit, and that a citation be issued as provided by law.

The defendants also pray that a supersedeas may be granted herein suspending the effect of said judgment until the final determination of said appeal by the United States Circuit Court of Appeals for the Second Circuit and the coming down of its mandate to the United States District Court for the Southern District of New York, that the amount of the appeal bond for superseding judg-

1633

ment be fixed at $828,847 and that the bond heretofore approved and filed on the 9th day of July, 1934, in the sum of $828,847 be accepted and approved as such bond.

Dated, New York, September 10, 1934.

THOMAS E. WHITE,
Attorney for Defendants,
99 John Street,
New York, N. Y.

1634

Upon the foregoing petition and upon all proceedings had heretofore herein, it is

ORDERED, that the appeal as above prayed for be and the same hereby is allowed; and

FURTHER ORDERED, that the amount of the appeal bond for superseding the judgment pending appeal is hereby fixed at $828,847 and that the bond heretofore approved and filed on the 9th day of July, 1934, in the sum of $828,847 be and the same hereby is approved as such bond, and execution upon the said judgment is hereby stayed until the final determination of said appeal by the United States Circuit Court of Appeals for the 1635
Second Circuit and the coming down of its mandate to the United States District Court for the Southern District of New York.

Dated, New York, September 10, 1934.

ALFRED C. COXE,
U. S. D. J.

Assignments of Error.

1636

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

1637 The above named defendants, Fidelity & Deposit Company of Maryland and American Bonding Company of Baltimore, by Thomas E. White, their attorney, assign error in the judgment and proceedings in the case as follows:

1. In that the Court struck out the first separate and distinct defence contained in the answer of the defendants.

2. In that the Court struck out the second separate and distinct defence contained in the answer of the defendants.

1638 3. In that the Court struck out the fourth separate and distinct defence contained in the answer of the defendants.

4. In that the Court struck out the fifth separate and distinct defence contained in the answer of the defendants.

5. In that the Court struck out the seventh separate and distinct defence contained in the answer of the defendants.

6. In that the Court struck out the eighth separate and distinct defence contained in the answer of the defendants. 1639

7. In that the Court struck out the ninth separate and distinct defence contained in the answer of the defendants.

8. In that the Court struck out the second separate and distinct defence contained in the amended answer of the defendants.

9. In that the Court struck out the third separate and distinct defence contained in the amended answer of the defendants.

1640

10. In that the Court struck out the fifth separate and distinct defence contained in the amended answer of the defendants.

11. In that the Court struck out the sixth separate and distinct defence contained in the amended answer of the defendants.

12. In that the Court denied defendants' motions to dimiss the complaint at the close of the case.

13. In that the Court directed a verdict in favor of the plaintiff for $777,934.54.

1641

14. In that the Court refused to direct a verdict in favor of the defendants.

15. In that the Court directed a verdict for $209,454.85 in favor of plaintiff on account of the items appearing in Exhibit No. 84.

16. In that the Court directed a verdict for $608 in favor of plaintiff for levelling cement floors.

1642 17. In that the Court directed a verdict for $875 in favor of plaintiff for window caulking.

18. In that the Court directed a verdict for $225 in favor of plaintiff for water proofing elevator pits.

19. In that the Court directed a verdict for $5,083.88 in favor of plaintiff for electric current.

20. In that the Court directed a verdict for $14,500.00 in favor of plaintiff for completing elevator installation.

21. In that the Court directed a verdict for
1643 $395.00 in favor of plaintiff for removing and reinstalling elevator pit equipment.

22. In that the Court directed a verdict for $406.01 in favor of plaintiff for unattached hardware left in the building when taken over.

23. In that the Court directed a verdict for $1,640.87 in favor of plaintiff for insurance premiums.

24. In that the Court directed a verdict for $72,882.00 in favor of plaintiff for painting.

25. In that the Court directed a verdict for
1644 $20,260.63 in favor of plaintiff for payroll.

26. In that the Court directed a verdict for $424.71 in favor of plaintiff for repairing compressor.

27. In that the Court directed a verdict for $13,647.42 in favor of plaintiff for steam consumption.

28. In that the Court directed a verdict for $6,500.00 in favor of plaintiff for supervision fee for completion.

29. In that the Court directed a verdict for 1645
$38,080.00 in favor of plaintiff for taxes for the first half of the year 1931.

30. In that the Court directed a verdict for $19,040.00 in favor of plaintiff for taxes for the second half of 1931, up to October 1, 1931.

31. In that the Court directed a verdict for $675.28 in favor of plaintiff for polishing terrazzo.

32. In that the Court directed a verdict for $143,542.28 in favor of plaintiff on account of the items appearing in Exhibit No. 85.

33. In that the Court directed a verdict for 1646
$2,175.00 in favor of plaintiff for the omission of bronze screens and glass for the same.

34. In that the Court directed a verdict for $4,408.00 in favor of plaintiff for cabinet work omitted.

35. In that the Court directed a verdict for $7,215.00 in favor of plaintiff for kellastone carpet strips omitted.

36. In that the Court directed a verdict for $5,137.00 in favor of plaintiff on account of wood stools and aprons omitted from metal windows. 1647

37. In that the Court directed a verdict for $800.00 in favor of plaintiff for wood flooring omitted in private dining rooms.

38. In that the Court directed a verdict for $2,037.76 in favor of plaintiff for omission of sanitary cove in cement base.

39. In that the Court directed a verdict for $3,557.00 in favor of plaintiff for closets omitted from servants' rooms.

1648 40. In that the Court directed a verdict for $300.00 in favor of plaintiff for charts omitted from panel boxes.

41. In that the Court directed a verdict for $250.00 in favor of plaintiff for unfinished electrical work in barber shop.

42. In that the Court directed a verdict for $4,069.44 in favor of plaintiff as the difference between the amount spent for medicine cabinets and the amount mentioned in the specifications as medicine cabinet expense.

1649 43. In that the Court directed a verdict for $19,150.00 in favor of plaintiff for the difference between the amount spent by plaintiff to complete painting and the amount which would have been required to comply with plans and specifications.

44. In that the Court directed a verdict for $100.00 in favor of plaintiff for sections for air filter and charging and cleaning tanks.

45. In that the Court directed a verdict for $713.00 in favor of plaintiff on account of plastering not done in the barber shop.

1650 46. In that the Court directed a verdict for $2,392.00 in favor of plaintiff on account of omission of Keene's cement wainscoating.

46A. In that the Court directed a verdict for $1,760.00 in favor of plaintiff on account of omission of plumbing items.

47. In that the Court directed a verdict for $500.00 in favor of plaintiff on account of payment to Fordham Cornice Works to furnish guarantee.

48. In that the Court directed a verdict for $2,840.00 in favor of plaintiff because of the fact that the speed of the express elevators was 600 feet per minute instead of 700 feet per minute. 1651

49. In that the Court directed a verdict for $200.00 in favor of plaintiff because iron kalamein doors were installed instead of copper doors.

50. In that the Court directed a verdict for $200.00 in favor of plaintiff because of omission of fireproofing.

51. In that the Court directed a verdict for $4,596.75 in favor of plaintiff because 681 bedroom mirrors were plain instead of beveled. 1652

52. In that the Court directed a verdict for $150.00 in favor of plaintiff for the omission of a door for book vault.

53. In that the Court directed a verdict for $26,900.00 in favor of plaintiff on account of the difference between the amount spent for lighting fixtures and the amount mentioned in the specifications for lighting fixture expense.

54. In that the Court directed a verdict for $22,600.00 in favor of plaintiff because of omission of fire places and mantel pieces. 1653

55. In that the Court directed a verdict for $1,870.35 in favor of plaintiff because terrazzo borders were installed on the lobby floor instead of marble borders.

56. In that the Court directed a verdict for $700.00 in favor of plaintiff for radiators omitted in stores.

1654 57. In that the Court directed a verdict for $375.00 in favor of plaintiff for the omission of valve charts and brass tags.

58. In that the Court directed a verdict for $25.00 in favor of plaintiff for one year's supply of gauge charts.

59. In that the Court directed a verdict for $200.00 in favor of plaintiff for thirteen terra cotta caps.

60. In that the Court directed a verdict for $12,416.00 in favor of plaintiff because of a
1655 change in plans to omit terra cotta.

61. In that the Court directed a verdict for $111.60 in favor of plaintiff because terrazzo on first floor was not polished.

62. In that the Court directed a verdict for $2,022.00 in favor of plaintiff because of omission of floor and wall tile in barber shop.

63. In that the Court directed a verdict for $1,030.00 in favor of plaintiff because soap dishes were installed in baths instead of combination soap, glass and tooth brush holders.

1656 64. In that the Court directed a verdict for $191.75 in favor of plaintiff because of omission of fixtures over lavatories in servants' rooms.

65. In that the Court directed a verdict for $8,849.63 in favor of plaintiff for fee of general contractor or architect to supervise completion of items listed in Exhibit No. 85.

66. In that the Court directed a verdict for $312,357.53 in favor of plaintiff as loss of interest

on the sum of $6,575,000.00 from December 16, 1930 to October 1, 1931. 1657

67. In that the Court sustained objection to the following question asked of the witness Grad:

> "Q. Many times the estimate in such a specification is put in a year or more before the particular articles are purchased; isn't that so?"

68. In that in the cross examination of the witness Grad regarding a conversation with the President of plaintiff, objection was sustained to the following question: 1658

> "Q. And didn't you tell him at that time about certain things which in your opinion were not in accordance with the plans and specifications?"

69. In that the Court over-ruled objection to the following question asked of the witness Lukach:

> "Q. Can you tell us what problems are involved in the completion of a building which differ in any way from those involved in straight construction work?" 1659

70. In that the Court sustained objection to the following question asked of the witness Lukach:

> "Q. Is there a place on this plan where these particular bronze screens could be put in?"

71. In that the Court sustained objection to the following question asked of the witness Lukach:

1660 "Q. Consider item 40 on schedule B, that is the racks and shelving—mail and key racks, file racks, etc. I will give this plaintiff's exhibit 85 to you (handing witness). In the rearrangement of the ground floor was provision made for the same spaces for clerks and information desk and telephone room, etc.?"

72. In that the Court sustained objection to the following question asked of the witness Lukach:

"Q. And many people use that instead of strips; isn't that so?"

1661 73. In that the Court over-ruled objection to the following question asked of the witness Lukach:

"Q. And how much did you have to pay them in order to have the equipment completed?"

74. In that the Court sustained objection to the following question asked of the witness Gladstone:

"Q. Now, do you know whether or not there is any custom in the City of New York regarding the reserving of the last or final coat
1662 of paint in apartments until some period later than the doing of the first coats of paint?"

75. In that the Court sustained objection to the following question asked of the witness Gladstone:

"Q. In your talks with Mr. Lukach, did he make any observation or complaint to you that the job which you had done was not a first quality job?"

76. In that the Court sustained objection to the following question asked of the witness Gladstone: 1663

"Q. Did he complain that the job which you had done was not in accordance with the specifications?"

77. In that the Court sustained objection to the following question asked of the witness Banfield:

"Q. In other words, if you had proceeded on the original plan the kitchen would not in your opinion have been a proper kitchen?" 1664

78. In that the Court sustained objection to the following question asked of the witness Banfield:

"Q. What, then, did you do as regards excavation?"

79. In that the Court sustained objection to the following question asked of the witness Banfield:

"Q. Were there, Mr. Banfield, instances where the material furnished and the equipment furnished and the work done on this 1665 building was in addition to or more valuable than the work and material which would have been necessary in order to complete the building according to the original plans and specifications?"

80. In that the Court sustained objection to the following question asked of the witness Banfield:

1666 "Q. What was the additional cost caused by the installation of copper radiators?"

81. In that in the examination of the witness Banfield regarding work done not provided by the plans and specifications where there were setbacks in the building, objection was sustained to the following question:

"Q. What was the additional cost involved in doing that work?"

82. In that in the examination of the witness Banfield regarding extra rock excavation beyond
1667 what was provided for by the plans and specifications, objection was sustained to the following question:

"Q. And what was the cost of that additional work?"

83. In that in the examination of the witness Banfield regarding improvements in the elevator system not provided for by the plans and specifications, objection was sustained to the following question:

"Q. And what was the additional cost of
1668 that?"

84. In that in the examination of the witness Banfield regarding the installation of a high tension system not provided by the plans and specifications, objection was sustained to the following question:

"Q. What was the value of that additional work?"

85. In that in the examination of the witness Banfield regarding the installation of certain

sound proofing not provided by the plans and specifications, objection was sustained to the following question: 1669

"Q. And what was the cost of that work?"

86. In that in the examination of the witness Banfield regarding the installation of 4 x 4 tile instead of 6 x 3 tile provided by the plans and specifications, objection was sustained to the following question:

"Q. And what was the value of that extra work?"

87. In that in the examination of the witness Banfield regarding the installation of cinder fill not provided by the plans and specifications, objection was sustained to the following question: 1670

"Q. What was the value of that additional work?"

88. In that in the examination of the witness Banfield regarding the installation of a steel tank instead of a wooden tank, objection was sustained to the following question:

"Q. What was the value of that extra work?" 1671

89. In that in the examination of the witness Banfield regarding an increase in the size of the incinerator beyond that provided by the plans and specifications, objection was sustained to the following question:

"Q. And what was the cost of that?"

90. In that in the examination of the witness Banfield regarding the installation of a system of

1672 indirect heating not provided by the plans and specifications, objection was sustained to the following question:

"Q. What was the value of that additional work?"

91. In that in the examination of the witness Banfield regarding an increase in the amount of the steel used in the building above what was provided by the plans and specifications, objection was sustained to the following question:

"Q. What was the additional cost—the ad-
1673 ditional value of that change?"

92. In that the Court sustained objection to the following question asked of the witness Banfield:

"Q. Now, assuming that there was about $100,000 worth of work to be done to make this building ready for occupancy, and that performing that $100,000 work the building would be complete, can you state whether or not the building, with these completed items in it was a building of a higher value than the building which would have been erected in
1674 strict accordance with the plans and specifications?"

93. In that the Court sustained objection to the following question asked of the witness Banfield:

"Q. And after having seen the building can you state whether or not the building as now constituted, leaving out of consideration any changes in the lobby floor or basement, is a building of greater value than the building

which would have been erected if the original plans and specifications had been complied with strictly?" 1675

94. In that the Court sustained objection to the following question asked of the witness Banfield:

"Q. I show you now defendant's Exhibit G for identification, and ask you whether the contractor for heating and ventilating approved the specification as the basis for the work to be done by him? (Handing witness)."

1676

95. In that in the examination of the witness Haas regarding his conversation with Bigelow at the time the contract between Central Park Properties and plaintiff was made, objection was sustained to the following question:

"Q. What talk did you have with him?"

96. In that the Court sustained objection to the following question asked of the witness Haas:

"Q. Then what, if anything, did he say to you regarding Mr. Walters?"

97. In that the Court sustained objection to 1677
the following question asked of the witness Haas:

"Q. Did Mr. Bigelow at that time tell you that Mr. Walters would have complete charge of the relations between the Central Park Properties and the Prudence Company?"

98. In that the Court sustained objection to the following question asked of the witness Haas:

"Q. Do you know how much it cost the Central Park Properties to erect this building, as far as it went?"

1678 99. In that the Court sustained objection to the following question asked of the witness Haas:

"Q. By erecting this building yourself or the Central Park Properties erecting this building itself instead of letting it to a general contractor, how much money or how much percentage was saved which a general contractor would receive?"

100. In that the Court sustained objection to the following question asked of the witness Lush:

"Q. And what was the total estimate to
1679 construct in accordance with those plans and specifications?"

101. In that the Court sustained objection to the following question asked of the witness Lush:

"Q. Assuming that after the Lefcourt organization withdrew from the work it was necessary to expend another $100,000 to complete the building, after the completion in that respect would you say whether or not the building after completed was as valuable or less valuable or more valuable than the building which would have been erected had the
1680 original plans and specifications been followed in every conceivable detail?"

102. In that the Court sustained objection to the following question asked of the witness Lush:

"Q. Taking into consideration that there have been certain alterations in the ground floor of that building, the ground and basement floor, and that there have been added to the serving pantries certain gas ranges, but leaving those items out of consideration,

is the building now as valuable as a building erected in strict accordance with these plans and specifications?'' 1681

103. In that the Court sustained objection to the following question asked of the witness Lush:

''Q. Would it have been a simple or difficult matter, Mr. Lush, to erect a building, a first class apartment hotel, on the premises in question, on the plans and specifications as originally drawn?''

104. In that the Court sustained objection to the following question asked of the witness Jacobs: 1682

''Q. Assume that you were requested to install in this building electric fixtures costing $50,000. Would you say whether or not those fixtures would be suitable to such a building or appropriate for such a building?''

105. In that the Court sustained objection to the following question asked of the witness Banfield:

''Q. And what manner did the Lefcourt organization contemplate using for the fixing of carpets on the floors?'' 1683

106. In that the Court held that there could be no waiver by the plaintiff of omissions and substitutions and changes in the plans and specifications except by a writing executed by an officer of the plaintiff.

107. In that the Court refused to allow testimony as to the value of the premises on December 16, 1930.

1684 108. In that the Court refused the request of the defendants to amend their answer to allege as a separate defense that the value of the premises on December 16, 1930 was in excess of the amount of the mortgage thereon.

WHEREFORE, the defendants pray that the judgment of the United States District Court for the Southern District of New York in favor of the plaintiff for $781,694.56 be reversed.

Dated, New York, September 10, 1934.

THOMAS E. WHITE,
1685 Attorney for Defendants,
99 John Street,
New York, N. Y.

Citation.

By the Honorable Alfred C. Coxe, one of the United States District Judges for the Southern District of New York, in the Second Circuit.

TO THE PRUDENCE COMPANY, INC.

GREETING:

1686 YOU ARE HEREBY CITED AND ADMONISHED to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 9th day of October, 1934, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore are appellants and you are ap-

pellees to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf. 1687

Given under my Hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 10th day of September, in the year of our Lord, One thousand nine hundred and thirty-four, and of the Independence of the United States the One hundred and fifty-ninth.

ALFRED C. COXE,
United States District Judge for the Southern District of New York, in the Second Circuit. 1688

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against 1689

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

Sir:

PLEASE TAKE NOTICE, that the defendants above named hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment in the sum of $781,694.56 in favor of the

1690 plaintiff and against the defendants entered herein in the office of the Clerk of this Court on the 14th day of June, 1934, and from each and every part of the judgment as well as from the whole thereof, and defendants intend to bring up for review on such an appeal the order dated February 17, 1933, and entered in the office of the Clerk of this Court on that day granting plaintiff's motion to strike out the first, second, third, fourth, fifth, seventh, eighth and ninth separate and distinct defenses contained in the answer of the defendants and the order dated July 28, 1933, and entered in the office of the Clerk of this Court
1691 on the 29th day of July, 1933, granting plaintiff's motion to strike out the second, third, fifth and sixth separate and distinct defenses contained in the amended answer of the defendants.

Dated September 10, 1934.

THOMAS E. WHITE,
Attorney for Defendants,
99 John Street,
New York, N. Y.

To: Clerk of U. S. District Court,
Southern District of N. Y.

1692 ALFRED T. DAVISON,
Attorney for Plaintiff,
2396 Third Ave., N. Y. C.